TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 58.

HENRY A. CRANE, PLAINTIFF IN ERROR,

vs.

CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS, AND TIMOTHY HOPKINS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JUNE 24, 1905.

(19,815.)

(19,815.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 313.

HENRY A. CRANE, PLAINTIFF IN ERROR,

vs.

CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS, AND TIMOTHY HOPKINS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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No. 1130

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HENRY A. CRANE,

Plaintiff in Error,

vs.

CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,

Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the Northern District of California.

In the Superior Court of the City and County of San Francisco, State of California.

HENRY A. CRANE,

Plaintiff,

vs.

CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS, and TIMOTHY HOPKINS,

Defendants.

Complaint.

Said plaintiff, Henry A. Crane, complains of said defendants, Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins, and for cause of action alleges:

1. That at the August Term, A. D. 1898, of the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, to wit, on the 16th day of November, A. D. 1898, a judgment and decree of said Court was duly given, made and entered in an action then and theretofore pending in said court, wherein said plaintiff herein was the plaintiff and sometimes therein styled the complainant, and wherein said Cornelius F. Buckley, one of the defendants herein, was the defendant, and sometimes therein styled the respondent; and said judgment and decree was, and has ever since been and is, so duly given, made and entered in favor of said plaintiff, Henry A. Crane, and against

said defendant, Cornelius F. Buckley; and said judgment and decree is hereby referred to and made a part of this complaint, and a copy thereof is hereto annexed and marked Exhibit "A" and made a part hereof.

2. That defendant Cornelius F. Buckley was then, on said 16th day of November, A. D. 1898, and he continued thereafter until the 4th day of November, A. D. 1899, in the exclusive possession, use and occupation of all of said real property, water ditches, water rights and rights of way described in said judgment and decree, a copy of which is hereto annexed and made a part hereof and marked Exhibit "A" as aforesaid.

3. That defendant, Cornelius F. Buckley, did not avail himself of the privilege so awarded him in and by said judgment and decree of paying the sums of money designated therein, or any part of said sums, for said property, and he did not pay for said property, or any part thereof, within the time limited in and by said judgment and decree, to wit, on or before January 1st, A. D. 1899, or since said last-mentioned time, or at all.

4. That on the 16th day of December, A. D. 1898, defendant, Cornelius F. Buckley, moved for and obtained an order of said Circuit Court of the United States, whereby he was allowed an appeal from said judgment and decree to the United States Circuit Court of Appeals in and for the Ninth Circuit, and whereby the amount of the bond to be given to operate as a supersedeas, and for costs upon said appeal was fixed at the

sum of eight thousand (8,000) dollars. That thereupon and thereafter defendant, Cornelius F. Buckley, prosecuted his said appeal, pursuant to said order allowing the same; and on the 28th day of December, A. D. 1898, defendant Cornelius F. Buckley, as principal, and defendants Rudolph Spreckels and Timothy Hopkins, as sureties, entered into, signed, executed and delivered a bond to the extent and for the sum of eight thousand (8,000) dollars to and in favor of plaintiff, and which was designed and intended to serve and operate, and which did serve and operate, as a supersedeas and for costs upon and pending said appeal; and said bond was approved by the Honorable Judge of said Court by and before whom said appeal was allowed; and on the 3d day of January, A. D. 1899, said bond was filed in said court and in the office of the clerk thereof; and said bond is hereby referred to and made a part of this complaint, and a copy thereof is hereto annexed and made a part hereof and marked Exhibit "B."

5. That said defendant, Cornelius F. Buckley, failed to make good his said appeal; and on the 2d day of October, A. D. 1899, said judgment and decree was affirmed, with costs, in and by said United States Circuit Court of Appeals; and thereafter on the 19th day of October, A. D. 1899, the writ of mandate of said last-named court was issued, whereby it was certified that said judgment and decree had been affirmed, with costs, and said writ of mandate was remitted to, and filed in, and

with the clerk of, said Circuit Court of the United States in which said judgment and decree was given, made and entered as aforesaid. That thereafter, to wit, on the 4th day of November, A. D. 1899, and not until said day, the possession of said property described in said judgment and decree was delivered by defendant, Cornelius F. Buckley, to plaintiff herein.

6. That because, and by reason, of said bond and of the undertakings and obligations therein and thereby made and provided by the defendants herein, and a copy of which is hereto annexed and made a part hereof and marked Exhibit "B" as aforesaid, defendant Cornelius F. Buckley was enabled to withhold and retain from plaintiff, and he did withhold and retain from plaintiff, the possession, use and occupation of all of said real property described in said judgment and decree, a copy of which is hereto annexed and made a part hereof and marked Exhibit "A," from the first day of January, A. D. 1899, until the fourth day of November, A. D. 1899; and defendant, Cornelius F. Buckley, was also enabled, by reason of said bond and of the undertakings and obligations therein and thereby made and provided by the defendants herein, to commit, and he did commit, waste of and upon said real property so described in said judgment and decree, between the third day of January, A. D. 1899, and the fourth day of November, A. D. 1899.

7. That the value of the use and occupation of said real property described in said judgment and decree, a

copy of which is hereto annexed and made a part hereof and marked Exhibit "A," from the 1st day of January, A. D. 1899, to the 4th day of November, A. D. 1899, has been, and is, over the sum of five thousand five hundred (5,500) dollars.

8. That defendant, Cornelius F. Buckley, caused and committed waste upon and of said real property described in said judgment and decree, a copy of which is hereto annexed and made a part hereof and marked Exhibit "A," between the 3d day of January, A. D. 1899, and said 4th day of November, A. D. 1899, to the extent and in the amount of over two thousand five hundred (2,500) dollars; and said waste consisted in tearing up, severing and removing from said real property a steam boiler, engines, machinery and appurtenances which were, up to the time of the tearing up, severing and removal thereof, built in brickwork and affixed to said real property and formed a part thereof, and were built, placed and constructed for use, and were used, in and for the purpose of carrying on and operating a creamery thereon; and also in tearing up, severing and removing from said real property three (3) water pumps, with a windmill and tower affixed to each for working the same, also two (2) other water pumps, with a horse-power machine affixed to each for working the same, and also two (2) other water pumps, and all of which were built, placed and constructed for use, and were used, for pumping water from water-wells, and all of

which were set in and affixed to said real property and formed a part thereof.

9. That since said 4th day of November, A. D. 1899, to wit, on the 15th day of December, A. D. 1899, plaintiff demanded from defendants, jointly and severally, the payment of said sum of eight thousand (8,000) dollars, to wit: Five thousand five hundred (5,500) dollars for the use and occupation of the real property described in said judgment and decree, a copy of which is hereto annexed and made a part hereof and marked Exhibit "A," and two thousand five hundred (2,500) dollars for waste committed on said real property from January 3d, A. D. 1899, to November 4th, A. D. 1899; and defendants and each of them refused, and still refuse, to pay the same or any part thereof, and no part thereof has been paid.

Wherefore, plaintiff herein prays judgment against said defendants jointly and severally for the sum of eight thousand (8,000) dollars, and for costs of this action, and for such other and further relief as this Honorable Court may deem proper herein.

MULLANY, GRANT & CUSHING,
Attorneys for Plaintiff,
104 Sutter St., San Francisco, Cal.

Exhibit "A."

At the August Term, A. D. 1898, of the Circuit Court of the United States of America, Ninth Judicial Circuit, in and for the Southern District of Cali-

fornia, held at the courtroom of said court in the city and count of Los Angeles on the 20th day of October, A. D. 1898, and following: Present: The Honorable OLIN WELLBORN, United States District Judge, sitting as Judge of said Circuit Court, came on for hearing and for adjudication the suit of

HENRY A. CRANE,
Complainant,
vs.
CORNELIUS F. BUCKLEY,
Defendant and Cross-Complainant.

Decree.

Registered Number 765.

This cause came on to be heard at the August term, A. D. 1898, of this Court upon the pleadings and testimony taken, filed and read, and the arguments of counsel, for the respective parties; and upon and after consideration thereof—

It is now ordered, adjudged and decreed that the cross-bill of complaint of said respondent, Cornelius F. Buckley, be, and the same is hereby, dismissed; and

It is now further ordered, adjudged and decreed that the complainant, Henry A. Crane, is the owner in fee simple of all of the real property, water ditches, water rights and rights of way described in his bill of complaint herein, and which are situated in the county of

Tulare, in said State of California, and of which the following is a description:

First, in township eighteen (18) south, of range twenty-three (23) east, Mount Diablo base and meridian, all of sections one (1), eleven (11), and twelve (12), also all of section thirteen (13), excepting one hundred and sixty (160) acres of the northwest (N. W.) portion of said section bounded on the northeast (N. E.), by the center line of the Southern Pacific Railroad Company's track, and on the south (S.) by a line running parallel with the north line of said section, and excepting also forty (40) acres of the southeast (S. E.) portion of said section, bounded on the southwest (S. W.), by the center line of said railroad track, and on the north (N.) by a line running parallel with the north (N.) line of said section thirteen (13), also all of the northwest (N. W. quarter of section fourteen (14), also all of section fifteen (15), also all of section twenty-three (23), excepting the south half of the southeast quarter (S. ½ of S. E. ¼), and the west half of the northeast quarter of the southeast quarter (W. ½ of N. E. ¼ of S. E. ¼) of said section twenty-three (23), and all of the northwest quarter (N. W. ¼) of section twenty-four (24);

And second, in township eighteen (18), south of range twenty-four (24) east, Mount Diablo base and meridian, all of the south half (S. ½), also the fractional south half of the northeast quarter (S. ½ of N. E. ¼), also lot number one (1), and also the south half of the northwest quarter (S. ½ of N. W. ¼) of section five (5), also all of

section seven (7), also all of the south half (S. ½) of section eight (8), and all of section nine (9), and which tracts of land comprise in the whole five thousand nine hundred and eighty-two (5,982) acres, more or less, and which includes the strips of land reserved for railroad purposes and rights of way of said Southern Pacific Railroad Company, and also all lands used or appropriated for county roads within said sections and parts of sections. Also that certain water ditch which heads at and takes water from the St. Johns river in or about the southeast quarter (S. E. ¼) of section eleven (11), in township eighteen (18) south, of range twenty-four (24) east, Mount Diablo base and meridian, and the franchise, easements and rights of way for said ditch, and which is known as the Manning and McLerie Ditch; and also the Cross Creek Water Company's Water Ditch, sometimes called the Hyde Ditch, and the franchise, easements and rights of way for said ditch, and all rates and rentals of and for said water supply from said ditches and the waters carried and flowing in the same; also a right of way for a water ditch twenty (20) feet wide, contiguous to and along the southwesterly (S. W.), line of the county road over the one hundred and sixty (160) acre tract of land of the northwest (N. W.), portion of section thirteen (13), in township eighteen (18) south, of range twenty-three (23) east, Mount Diablo base and meridian, bounded on the northeast (N. E.) by the center line of the Southern Pacific Railroad Com-

pany's track, on the south (S.) by a line running parallel with the north (N.), line of said section, and which county road hereinbefore mentioned runs contiguous to and along the southwesterly (S. W.) line of the strip of land reserved by said railroad company along the line of its road.

It is now hereby further ordered, adjudged and decreed that all the rights, interests and claims of said respondent, Cornelius F. Buckley, in and to said real property, water ditches, water rights and rights of way, and every part thereof, have been and are forever foreclosed and terminated, subject only to the equitable privilege, to wit, inasmuch as said respondent has made some payments to complainant under an agreement dated June 9th, A. D. 1892, mentioned in the bill of complaint, to purchase said real property, water ditches, water rights and rights of way, notwithstanding his failure to comply with the provisions of said agreement as to the payment of the remainder of said purchase price, and as to other matters therein provided to be performed, this Court decrees as equitable that the privilege shall be and hereby is given to said respondent, Cornelius F. Buckley, to pay to said complainant, Henry A. Crane, at any time up to the first (1st) day of January, A. D. one thousand eight hundred and ninety-nine (1899), the unpaid portion of said purchase price of said property, viz., sixty thousand ($60,000) dollars, in United States gold coin, and interest thereon in like gold

coin from the 18th day of March, A. D. one thousand eight hundred and ninety-four (1894), at the rate of nine (9) per centum per annum, until such payment is made, and also to pay to said complainant, Henry A. Crane, all taxes and assessments levied upon or against said property, or any part thereof, paid by him, Henry A. Crane, after the same became or shall become delinquent, including penalties and costs thereon and interest upon the whole at the rate of nine (9) per centum per annum from the time of payment thereof by said Henry A. Crane, and also to pay to said complainant, Henry A. Crane, all moneys which he shall hereafter expend in keeping and maintaining good and substantial headgates at the heads of said two water ditches herein described, upon the failure of said respondent, Cornelius F. Buckley, to keep and maintain such headgates in good order, and interest upon the same at the rate of nine (9) per centum per annum from the date of such expenditure by complainant, Henry A. Crane; and upon the payment of said several amounts of money to said Henry A. Crane, on or before said first day of January, A. D. 1899, he shall convey to said Cornelius F. Buckley said real property, water ditches, water rights and rights of way to the extent named and as provided in said agreement of sale and purchase dated June 9th, A. D. 1892, mentioned in the bill of complaint herein. But in case said respondent, Cornelius F. Buckley, shall fail to pay to complainant, Henry A. Crane, the said amounts of money hereinbefore designated and mentioned on or before the first day of January, A. D.

1899, then and in that event it is ordered, adjudged and decreed that all the rights, interests and claims of said respondent, Cornelius F. Buckley, and all persons and parties claiming under him, in and to said real property, water ditches, water rights and rights of way, and every part thereof, shall be forever foreclosed and terminated, and that said Cornelius F. Buckley, and all parties claiming under him, be removed and turned out of and from the possession, use and occupation of said real property, water ditches, water rights and rights of way, and that said complainant, Henry A. Crane, or his legal representatives, be placed in, and restored to, the actual and exclusive possession, use and occupation of said real property, water ditches, water rights and rights of way, and every part thereof, and thereafter maintained and kept in said possession, use and occupation thereof, as against said respondent, Cornelius F. Buckley, and all persons and parties claiming under him; and that respondent, Cornelius F. Buckley, and all persons and parties claiming under him, are and shall continue to be enjoined and forbidden from setting up or asserting any right, interest or claim now existing in or to said real property, water ditches, water rights or rights of way, or any part thereof. And unless said respondent shall place on file herein some sufficient and satisfactory evidence that he has paid, or has tendered, and is able, ready and willing to pay, to said complainant, Henry A. Crane, the amounts of money hereinbefore provided to be paid for the purchase of said property, on or before the first day of

January, A. D. 1899, it is ordered, adjudged and decreed that the clerk of this court, do, on request of said complainant, Henry A. Crane, or of his counsel, issue a suitable and sufficient order or writ to the marshal of this court, and under the seal thereof, to remove said respondent, Cornelius F. Buckley, from the possession, use and occupation of said real property, water ditches, water rights and rights of way, and to place complainant, Henry A. Crane, or his legal representatives, in the exclusive possession, use and occupation thereof.

It is further ordered, adjudged and decree that complainant, Henry A. Crane, do have and recover his costs herein taxed at $373.20 from said respondent, Cornelius F. Buckley, and that after the expiration of thirty-five (35) days from the time when the same shall be taxed and definitely ascertained, the clerk of this court do, on application therefor, issue a writ of this Court, under the seal thereof, to the marshal thereof to effect a levy for, and collection of, said costs.

Done in open court this 16th day of November, A. D. 1898.

OLIN WELLBORN,

United States District Judge, Sitting as Judge of said United States Circuit Court.

Decree entered and recorded November 16th, 1898.

WM. M. VAN DYKE,

Clerk.

[Endorsed]: Filed Nov. 16, 1898. Wm. M. Van Dyke, Clerk.

Exhibit "B."

In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California.

HENRY A. CRANE,
Complainant,

vs.

C. F. BUCKLEY,
Respondent and Cross-Complainant.

Bond on Appeal.

Know all men by these presents, that we, C. F. Buckley, as principal, and Rudolph Spreckels and Timothy Hopkins, as sureties, are held and firmly bound unto Henry A. Crane, in the full and just sum of eight thousand (8,000) dollars, to be paid to the said Henry A. Crane, his attorneys, executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 27th day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas, lately at a session of the Circuit Court of the United States, Ninth Circuit, for the Southern District of California, in a suit depending in said court, between Henry A. Crane, complainant, and C. F. Buckley, respondent and cross-complainant, judgment was entered against said respondent and cross-complainant, and the said respondent and cross-complainant having obtained from said Court an order allowing an appeal to reverse the decree in the aforesaid court, and a citation

directed to said Henry A. Crane and to his solicitors is about to be issued citing and admonishing them to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the fifteenth day of January, 1899, and

Whereas, the said respondent and cross-complainant is desirous of staying the execution of the said judgment so appealed from in so far as it relates to the possession of the land and premises involved therein, and is desirous of staying the execution of said judgment or decree so appealed from in so far as it relates to the costs awarded to complainant therein,

Now, the condition of the above obligation is such, that if the said C. F. Buckley shall prosecute his appeal to effect, and shall answer all damages and costs that have been and shall be awarded against him if he fails to make his appeal good, and if he shall answer all damages that shall accrue to the said respondent by reason of the value of the use and occupation of the land and premises from the time of said appeal, until the delivery of possession thereof to said Henry A. Crane, and for all waste committed thereon, then the above obligation to be void, else to remain in full force and effect.

Dated, this 27th day of December, A. D. 1898.

C. F. BUCKLEY. [Seal]
R. SPRECKELS. [Seal]
TIMOTHY HOPKINS. [Seal]

(U. S. Int. Rev. Stamp, 25 cents.)

(U. S. Int. Rev. Stamp, 25 cents.)

United States of America,
Northern District of California,
City and County of San Francisco.

Rudolph Spreckels and Timothy Hopkins being duly sworn each for himself deposes and says:

That he is a freeholder in said district, and is worth the sum of eight thousand dollars (8,000), exclusive of property exempt from execution, over and above all debts and liabilities.

R. SPRECKELS.
TIMOTHY HOPKINS.

Subscribed and sworn to before me, this 28th day of December, 1898.

[Seal] CHAS. W. SMYTH,
Notary Public in and for the City and County of San Francisco, State of California.

(U. S. Int. Rev. Stamp, 10 cents.)

Approved in open court by

OLIN WELLBORN,
Judge.

[Endorsed]: Filed Jan. 3, 1899. Wm. M. Van Dyke, Clerk.

State of California,
City and County of San Francisco. } ss.

Henry A. Crane, being sworn, deposes: That he is the plaintiff in this action above entitled; that he has read the foregoing complaint and knows the contents

thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

HENRY A. CRANE.

Subscribed and sworn to before me, this 8th day of January, 1900.

[Seal] JAMES L. KING,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 8, 1900. Wm. M. Deane, Clerk. By Joseph Riordan, Deputy Clerk.

In the Superior Court of the City and County of San Francisco, State of California.

HENRY A. CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants.

Demurrer.

Now come the above-named defendants, Cornelius F. Buckley, Timothy Hopkins and Rudolph Spreckels, and demur to the complaint of plaintiff on file herein, and for cause of demurrer allege:

1. That said complaint does not state facts sufficient to constitute a cause of action against said defendants, or any of them.

2. That said complaint is uncertain, in this, that it is impossible to ascertain or determine therefrom how much over the sum of five thousand dollars, the value of the use and occupation of said real property referred to in paragraph 7 of said complaint was or is, for or during the period in said paragraph mentioned, or what the value of the use and occupation of said real property during said period was or is.

3. That said complaint is uncertain in this, that it is impossible to ascertain or determine therefrom how said C. F. Buckley was by reason of said bond and the undertakings and obligations therein and thereby made, enabled to commit waste upon said real property.

4. That said complaint is uncertain in this that it is impossible to ascertain or determine therefrom whether said plaintiff relies upon a cause of action against said defendants for the value of the use and occupation of said real property or on a cause of action for waste committed by said C. F. Buckley on said real property.

5. That said complaint is uncertain in this, that two causes of action against said defendants are stated in said complaint, and not separately pleaded, to wit, a cause of action for the value of the use and occupation

of said premises between January 1st, 1899, and the 4th day of November, 1899, with a cause of action for waste committed by said C. F. Buckley during said period, upon said real property.

6. That said complaint is uncertain in that, that it is impossible to ascertain or determine therefrom how much over the sum of two thousand five hundred dollars, was or is the waste committed by said C. F. Buckley during the period referred to in paragraph 8 of said complaint or what was or is the amount of waste so alleged to have been committed during said period, by said C. F. Buckley.

Wherefore, said defendants pray to be hence dismissed with judgment for their costs.

Dated, San Francisco, January 23d, 1900.

SULLIVAN & SULLIVAN,

THEODORE J. ROCHE,

Attorneys for Said Defendants.

BISHOP & WHEELER,

Of Counsel.

[Endorsed]: Filed Jan. 23, 4 P. M., 1900. Wm. A. Deane, Clerk. By T. C. Maher, Deputy Clerk.

In the Superior Court of the City and County of San Francisco, State of California.

HENRY A. CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants.

Petition for Removal of Cause to Circuit Court of the United States.

To the Honorable, the Superior Court of the City and County of San Francisco, State of California:

The petition of Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins respectfully shows:

1. That they are and each of them is a defendant in the above-entitled action; that the above-entitled action was commenced on the 8th day of January, 1900, in the above-entitled court by the above-named plaintiff against said defendants by the filing of a complaint with the clerk of said court.

2. That thereafter, and on said 8th day of January, 1900, summons was issued in said action out of and under the seal of said Court, and thereafter and prior to the filing of this petition service of said summons was

made upon each of said defendants, at the city and county of San Francisco, State of California.

3. That said action is one of a civil nature at common law, and ever since the 8th day of January, 1900, when said complaint was filed and summons issued has been and still is pending in the Superior Court in and for the city and county of San Francisco, State of California, and that the matter or amount in dispute in said action exceeds exclusive of interest, the sum of $2,000.00.

That under and by virtue of the laws of the State of California, in this behalf enacted, and the rules of said court in which said action is brought, said Cornelius F. Buckley, one of the defendants herein, is required to answer or plead to the complaint of plaintiff filed in said action on Tuesday, the 23d day of January, 1900, and that said defendant, Cornelius F. Buckley, one of your petitioners has not nor have said defendants Rudolph Spreckels and Timothy Hopkins, the other of said defendants in said action answered, pleaded or otherwise appeared in said action.

That the above-entitled action is a suit of a civil nature at common law, where the matter or amount in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and upon and according to the information and belief of your petitioners arises under the laws of the State of California, and in that behalf your petitioners allege:

(a) That at the August term, 1898, of the Circuit Court of the United States, Ninth Judicial Circuit, in

and for the Southern District of California, to wit, on the 16th day of November, 1898, a judgment and decree of said Court was duly given, made and entered in an action then and therefore pending in said court, wherein the above-named plaintiff, Henry A. Crane was the complainant and wherein said Cornelius F. Buckley, one of your petitioners and one of the defendants in the above-entitled action was the respondent.

(b) That on the 16th day of December, 1898, said respondent therein, Cornelius F. Buckley, and one of the petitioners herein moved for and obtained an order of said Circuit Court of the United States, whereby he was allowed an appeal from said judgment and decree to the United States Circuit Court of Appeals in and for the Ninth Circuit and whereby the amount of the bond to be given to operate as a supersedeas and for costs upon said appeal was fixed at the sum of $8,000.

(c) That thereafter said respondent therein, Cornelius F. Buckley prosecuted his said appeal to said Circuit of Appeals, pursuant to said order, allowing the same.

(d) That on the 28th day of December, 1898, said defendant in the above-entitled action, Cornelius F. Buckley, as principal, and Rudolph Spreckels and Timothy Hopkins, as sureties, said petitioners herein, in pursuance of said order and section 1000 of the Revised Statutes of the United States, signed, executed and delivered a bond to the extent and for the sum of $8,000 to and in favor of said complainant, Henry A. Crane, designed and intended to serve and operate as a supersedeas and

for costs pending upon said appeal, a copy of which said bond is hereunto annexed, hereby referred to and hereby made a part hereof, marked Exhibit "A." That said bond was approved by the Honorable Judge of said court by whom said appeal was allowed, and on the 3d day of January, 1899, said bond was filed in said court and in the office of the clerk thereof.

(e) That thereafter and on the 17th day of October, 1899, said judgment and decree of said Circuit Court was by said Circuit Court of Appeals affirmed in part and modified in part and that thereafter and on the 19th day of October, 1899, a writ of mandate of said last-named court was issued, whereby it was certified that said judgment and decree had been affirmed in part and modified in part.

That your petitioners now represent and allege that the determination of their liability upon said bond depends upon the construction of the judgment and decree of said Circuit Court of Appeals upon the said appeal of said respondent in said action, Cornelius F. Buckley, and one of the petitioners herein, from said judgment and decree so given and made against him in said Circuit Court of the United States, Ninth Judicial Circuit in and for the Southern District of California as aforesaid; that your petitioners will and do claim that under and in pursuance of said judgment and decree so made by said Circuit Court of Appeals, your petitioners were and each of them was released from any and all liability upon said bond, in so far as it relates to the value of the use and occupation of the land and

premises in said bond referred to from the time of said appeal, until the 1st day of November, 1899.

That your petitioners now represent and allege that the determination of their liability to pay the amount specified in said bond, or any part thereof, for the reasonable value of the use and occupation of the premises referred to in said bond depends upon a construction of an Act of Congress of the United States.

That said defendants and your petitioners will and do claim that under and in pursuance of the provisions of section 1000 of the Revised Statutes of the United States, and under and in pursuance of which section of the Revised Statutes of the United States said order allowing the appeal of said petitioner, Cornelius F. Buckley, and fixing the amount of said bond as aforesaid was made, your petitioners are not liable for the reasonable or any value of the use and occupation of all or any part of the land or premises referred to in said bond, prior to the 1st day of November, 1899, for the reason that said judgment and decree of said Circuit Court of Appeals modified the said judgment of said Circuit Court as aforesaid.

That your petitioners now represent and allege that the determination of their liability to pay the amount specified in said bond, or any part thereof, for the reasonable value of the use and occupation of the premises referred to in said bond, depends upon the construction of an Act of Congress of the United States; that the defendants, your petitioners will and do claim that under and in pursuance of the provisions of section 1000

of the Revised Statutes of the United States, said defendants and your petitioners, are not nor are any of them, liable for any part or portion of the reasonable or any value of the use and occupation of said land and premises in said bond referred to prior to the 1st day of November, 1899.

That upon and according to the information and belief of your petitioners, said plaintiff, Henry A. Crane, will and does claim that the liability of said defendants and your petitioners upon said bond is under and in pursuance of section 1000 of the Revised Statutes of the United States and of said judgment and decree of said Circuit Court, and of said judgment of said Circuit Court of Appeals, and your petitioners allege that one of the questions involved in said action arises out of and depends upon the construction to be given to the aforesaid section of the Revised Statutes of the United States, and that the decision of this case, and of one of the issues arising therein between said plaintiff and all of said defendants depends upon the construction of the aforesaid section of the Revised Statutes of the United States, relating to the taking of good and sufficient security upon an appeal in a suit from a Circuit Court to a Circuit Court of Appeals, and this action arises mainly out of the controversy between the parties in regard to the operation and effect of said section of the Revised Statutes of the United States, and said judgment and decree of said Circuit Court and said Circuit Court of Appeals, upon the facts involved.

Wherefore, your petitioners herewith present a good and sufficient bond as provided by the statutes in such cases made and provided that until on or about the 1st day of the next ensuing session of the United States Circuit Court, in and for the Northern District of California file therein a transcript of the record of this action, and for the payment of all costs which may be awarded by the said court, if the said Circuit Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioners further therefore pray that this court proceed no further herein except to make the order of removal as required by law and to accept the bond presented herewith and direct a transcript of the record herein to be made for said court as provided by law and as in duty bound.

And your petitioners will ever pray, etc.

Dated, Jan. 22, 1900.

C. F. BUCKLEY,
TIMOTHY HOPKINS,
R. SPRECKELS,
Petitioners and Defendants.

SULLIVAN & SULLIVAN,
THEO. J. ROCHE,
Attys. for Petitioners.
BISHOP & WHEELER,
Of Counsel.

State of California,
City and County of San Francisco. } ss.

Cornelius F. Buckley, being duly sworn, says: I am one of the petitioners in the above-entitled action; I have read said petition and the same is true of my own knowledge, except as to those matters therein stated on information or belief, and as to such matters I believe it to be true.

C. F. BUCKLEY.

Subscribed and sworn to before me, this 23d day of January, 1900.

[Seal] JOHN O. CASHIN,

Notary Public in and for the City and County of San Francisco, State of California.

Exhibit "A."

In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California.

HENRY A. CRANE,
Complainant,
vs.
C. F. BUCKLEY,
Respondent and Cross-Complainant.

Bond on Appeal.

Know all men by these presents, that we, C. F. Buckley, as principal, and Rudolph Spreckels and Timothy Hopkins, as sureties, are held and firmly bound unto Henry A. Crane, in the full and just sum of eight thou-

sand (8,000) dollars, to be paid to the said Henry A. Crane, his attorneys, executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 27th day of December, in the year of our Lord, one thousand eight hundred and ninety-eight.

Whereas, lately, at a session of the Circuit Court of the United States, Ninth Circuit, for the Southern District of California, in a suit depending in said Court, between Henry A. Crane, complainant, and C. F. Buckley, respondent and cross-complainant, judgment was entered against said respondent and cross-complainant, and the said respondent and cross-complainant having obtained from said Court an order allowing an appeal to reverse the decree in the aforesaid court, and a citation directed to the said Henry A. Crane and to his solicitors is about to be issued citing and admonishing them to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco in the State of California, on the fifteenth day of January, 1899, and,

Whereas, the said respondent and cross-complainant is desirous of staying the execution of the said judgment so appealed from in so far as it relates to the possession of the land and premises involved therein, and is desirous of staying the execution of said judgment or decree so appealed from in so far as it relates to the costs awarded to complainant therein,

Now, the condition of the above obligation is such, that if the said C. F. Buckley shall prosecute his appeal to effect and shall answer all damages and costs that have been and shall be awarded against him if he fails to make his appeal good, and if he shall answer all damages that shall accrue to the said respondent by reason of the value of the use and occupation of the land and premises from the time of said appeal, until the delivery of possession thereof to said Henry A. Crane, and for all waste committed thereon then the above obligation to be void, else to remain in full force and effect.

Dated, this 27th day of December, A. D. 1898.

C. F. BUCKLEY. [Seal]
R. SPRECKELS. [Seal]
TIMOTHY HOPKINS. [Seal]

(U. S. Int. Rev. Stamp 25 cents.)

(U. S. Int. Rev. Stamp 25 cents.)

United States of America,
Northern District of California,
City and County of San Francisco.

Rudolph Spreckels and Timothy Hopkins, being duly sworn, each for himself deposes and says:

That he is a freeholder in said District, and is worth the sum of eight thousand (8,000) dollars, exclusive of property exempt from execution, over and above all debts and liabilities.

R. SPRECKELS.
TIMOTHY HOPKINS.

Subscribed and sworn to before me, this 28th day of December, 1898.

[Seal] CHAS. W. SMYTH,

Notary Public in and for the City and County of San Francisco, State of California.

(U. S. Int. Rev. Stamp 10 cents.)

Approved in open court by

OLIN WELLBORN,

Judge.

[Endorsed]: Filed Jan. 3, 1899. Wm. M. Van Dyke, Clerk.

[Endorsed]: Filed Jan. 23, 4 P. M., 1900. Wm. A. Deane, Clerk. By T. C. Maher, Deputy Clerk.

Bond on Removal of Cause.

Know all men by these presents, that we, C. F. Buckley, Rudolph Spreckels and Timothy Hopkins, as principals, and Matt I. Sullivan and J. J. O'Toole as sureties, are held and firmly bound unto Henry A. Crane, in the sum of five hundred (500) dollars, gold coin of the United States of America, the payment whereof well and truly to be made unto the said Henry A. Crane, his heirs, executors and administrators, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

The conditions of this undertaking are such, that Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins, the above-named defendants, have petitioned the Superior Court, in and for the city and county of

San Francisco, State of California, for the removal of a certain cause or action therein pending, wherein Henry A. Crane is plaintiff, and said C. F. Buckley, Rudolph Spreckels and Timothy Hopkins are defendants and numbered 70951 on the records of said court, to the Circuit Court of the United States, in and for the Northern District of California, Ninth Judicial Circuit.

Now, if the said C. F. Buckley, Rudolph Spreckels and Timothy Hopkins shall enter in the said Circuit Court of the United States on the first day of its next session, a copy of its record in said action, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if the said court shall determine that said suit was wrongfully or improperly removed thereto, then this obligation to be null and void, otherwise to remain in full force and effect.

In witness whereof, the said parties to these presents have hereunto fixed their hands and seals this 23d day of January, 1900.

C. F. BUCKLEY. [Seal.]
TIMOTHY HOPKINS. [Seal]
R. SPRECKELS. [Seal]
MATT I. SULLIVAN. [Seal]
JNO. J. O'TOOLE. [Seal]

State of California,
City and County of San Francisco. } ss.

Matt I. Sullivan and Jno. J. O'Toole, being each severally duly sworn, deposes and says: That he is the person named in and who executed the foregoing bond as a surety

thereto; that he is a citizen of the United States and the State of California, and a resident of the city and county of San Francisco; that he is a freeholder within the said city and county of San Francisco, and worth more than the sum of five hundred dollars, over and above his just debts and liabilities, and exclusive of property exempt from execution.

MATT I. SULLIVAN.
JNO. J. O'TOOLE.

Subscribed and sworn to before me, this 23d day of January, 1900.

[Seal] JOHN P. CASHIN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 23d, 4 P. M., 1900. Wm. A. Deane, Clerk. By T. C. Maher, Deputy Clerk.

In the Superior Court of the City and County of San Francisco, State of California.

HENRY A. CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants.

Order of Removal of Cause to United States Circuit Court.

Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins, defendants in the above-entitled action, having,

on the 23d day of January, 1900, filed a petition herein, praying for the removal of this action from the Superior Court of the city and county of San Francisco, State of California, into the Circuit Court of the United States, in and for the Northern District of California, Ninth Judicial Circuit, pursuant to and in conformity with the Revised Statutes of the United States, in such cases made and provided, and the said petitioners and defendants having also on said day filed with said petition, a bond in compliance with the said Revised Statutes of the United States in due and proper form, and with good and sufficient sureties, as provided by law,

And it appearing to the Court from said petition and the pleadings herein that this is a proper cause for removal to said Circuit Court, and that said bond is made with good and sufficient sureties and as required by law,

Now, therefore, on motion of Messrs. Sullivan & Sullivan, and Theodore J. Roche, Esq., attorneys for said petitioners and defendants therein, Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins, it is hereby ordered that this Court accept and approve, and it does hereby accept and approve, said bond, so given, as aforesaid.

And it is further ordered that this suit be, and the same is hereby, removed and transferred to the said Circuit Court of the United States in and for the Northern District of California, Ninth Judicial Circuit, and that this court proceed no further in this action, and the clerk of

this court is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court, this 23d day of January, 1900.

EDW'D A. BELCHER,

Judge of the Superior Court.

[Endorsed]: Filed Jan. 23, 4 P. M., 1900. Wm. A. Deane, Clerk. By T. C. Maher, Deputy Clerk.

Clerk's Certificate to Record on Removal.

State of California,
City and County of San Francisco. } ss.

I, William A. Deane, county clerk and ex-officio clerk of the Superior Court of the city and county of San Francisco, State of California, do hereby certify: That the foregoing are true and correct copies of the complaint, petition of Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins to transfer action to the United States Circuit Court, bond given on removal, and order transferring cause:

And I further certify that the foregoing compose all the papers filed in the case of "Henry A. Crane vs. Cornelius F. Buckley et als.," and numbered 70,951 on the records of said court.

In witness whereof, I have hereunto set my hand and the seal of said court this 25th day of January, A. D. 1900.

[Seal] WM. A. DEANE,
Clerk.

By Chas. E. Corey,
Deputy Clerk.

[Endorsed]: No. 12,884. In the Circuit Court. Henry A. Crane, Plaintiff, vs. C. F. Buckley et als., Defendants. Record of Papers etc. in Above Action. Filed January 27, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to wit, the March term, A. D. 1901, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday, the 4th day of March, in the year of our Lord one thousand nine hundred and one. Present: The Honorable WILLIAM W. MORROW, Circuit Judge.

HENRY A. CRANE,
vs.
C. F. BUCKLEY, et al. } No. 12,884.

Order Overruling Demurrer.

Defendant's demurrer to the complaint herein was this day submitted to the Court without argument, and it was thereupon ordered that said demurrer be and hereby is

overruled, with leave to defendants to answer within 20 days, and notice of said overruling was waived in open Court.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

HENRY CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants.

Answer.

Now come the above-named defendants, Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins, and for answer to the complaint of plaintiff on file herein, deny and allege as follows, to wit:

Deny that said defendant, Cornelius F. Buckley, failed to make good his said appeal.

Deny that on the 2d day of October, 1899, or at any other time or at all, except as hereinafter alleged, said judgment and decree or judgment or decree was affirmed, with costs or otherwise, in and by said United States Circuit Court of Appeals, or that thereafter and on the 19th day of October, 1899, or at any other time or at all, a writ of mandate of said last mentioned court was issued, whereby it was certified that said judgment and decree or judgment or decree had been affirmed, with costs or otherwise.

Deny that any writ of mandate affirming said judgment and decree was remitted to or filed in or with the clerk of said Circuit Court of the United States, in which said judgment or decree was given, made or entered as aforesaid.

And in this behalf, said defendants allege:

That on said 19th day of October, 1899, said United States Circuit Court of Appeals, by its judgment duly given and made upon said appeal of said Cornelius F. Buckley, from said judgment and decree so made and entered against him, in said action, by said United States Circuit Court, Ninth Judicial Circuit, Southern District of California, a copy of which said judgment and decree is annexed to and made a part of plaintiff's complaint, and therein marked Exhibit "A," modified said judgment and decree by changing the date therein contained upon which said Cornelius F. Buckley was to vacate and deliver to said plaintiff, Henry A. Crane, the possession of all of said premises therein described, or pay to plaintiff the amount due as found and declared by said judgment and decree, from the 1st day of January, 1899, to the 1st day of November, 1899, and as so modified said judgment and decree was affirmed.

That thereafter and on or about said 19th day of October, 1899, a writ of mandate of said United States Circuit Court of Appeals was duly issued upon said appeal, in said action, whereby it certified that said judgment and decree so made and entered by said Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, in said action, had been

and was modified by said United States Circuit Court of Appeals, as aforesaid.

Deny that said defendant, Cornelius F. Buckley, withheld and retained from plaintiff the possession, use or occupation of all or any of said real property described in said judgment or decree, a copy of which is annexed to and made a part of the complaint of plaintiff on file herein, and marked Exhibit "A," from the 1st day of January, 1899, until the 4th day of November, 1899, or that he withheld or retained from plaintiff the possession, use or occupation of any or all, or any portion of said real property described in said judgment or decree, during or for any period of time whatever prior to the 2d day of November, 1899, and deny that said defendant, Cornelius F. Buckley did commit waste of or upon said real property so described in said judgment and decree between the 3d day of January, 1899, and the 4th day of November, 1899.

Deny that the value of the use and occupation or use or occupation of said real property described in said judgment and decree annexed to and made a part of said complaint and therein marked Exhibit "A," from the 1st day of January, 1899, to the 4th day of November, 1899, has been or is over the sum of $5,500.00, or any sum whatever.

Deny that said defendant, Cornelius F. Buckley, caused or committed waste upon or of said real property described in said judgment or decree between the said 3d day of January, 1899, and said 4th day of November, 1899, to the extent or in the amount of over $2,500.00, or to the extent or in the amount of any sum whatsoever.

Deny that said waste consisted in tearing up, severing or removing from said real property the steam boiler or any steam boiler, engines or any engine, machinery and appliances, or any machinery or appliances, which were up to the time of the tearing up, severing or removal thereof, or at any time, or at all, built in brickwork or affixed to said real property or forming part thereof, or which were built, placed and constructed, or built, placed or constructed for use or which were used in or for the purpose of carrying on or operating the creamery thereon, and deny that said waste or any waste consisted in tearing up, severing and removing or tearing up, severing or removing from said real property, three water pumps with a wind mill and tower affixed to each for working the same, or any water pumps or water pump with or without a wind mill or tower attached thereto, or that said waste consisted in tearing up, severing and removing, or tearing up, severing or removing two other water pumps, or any water pumps, with a horse power machine affixed to each for working the same, or otherwise, or also any other pumps or pump whatsoever;

Deny that any pumps or other appliances which were torn up, severed or removed from said real property by said defendant, Cornelius F. Buckley, during said period of time hereinabove mentioned, were built, placed or constructed for use or were used for pumping water from water wells, or that any or all of said pumps were affixed to said real property or formed a part thereof;

Wherefore, defendants pray that plaintiff take nothing by his said action, and that they have judgment for their costs in this action.

Dated, Mar. 25, 1901.

THEODORE J. ROCHE,
SULLIVAN & SULLIVAN,
Attys. for Defendants.

State of California,
City and County of San Francisco. } ss.

Cornelius F. Buckley, of said city and county, being duly sworn deposes and says, that he is one of the defendants in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and that as to those matters he believes it to be true.

C. F. BUCKLEY.

Subscribd and sworn to before me, this 25th day of March, A. D. 1901.

[Seal] JOHN P. CASHIN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Receipt of a copy of the within admitted this 25th day of March, 1901.

MULLANY, GRANT & CUSHING,
Attorneys for Plaintiff.

Filed March 25, 1901. Southard Hoffman, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

HENRY CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY, et al.,
Defendants.
12,884.

Stipulation for Amendment of Complaint.

San Francisco, Cal., August 18, 1902.

It is stipulated that said plaintiff may amend and procure order for leave to amend his complaint in said action, by inserting at the end of line 21, on page 5, of the complaint the words, "and no part thereof has been paid."

THEODORE J. ROCHE,
SULLIVAN & SULLIVAN,
Attorneys for Defendants.

[Endorsed]: Filed August 28, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

HENRY A. CRANE,
Plaintiff,

vs.

CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants.

Amendment to Answer.

Now come the above-named defendants, Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins, and by leave of Court first had and obtained files the following amendment to their answer on file herein, viz:

Page 2, between lines 23 and 24 insert the following: "That thereafter, and on the 23d day of October, 1899, said Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, by its judgment duly given and made, modified said judgment and decree theretofore given, made and entered in said action, a copy of which is annexed to and made a part of plaintiff's complaint and therein marked Exhibit "A," by changing the date therein contained upon which said Cornelius F. Buckley was to vacate and deliver to said plaintiff, Henry A. Crane, the possession of all of said premises therein described,

or pay to plaintiff the amount due as found and declared by said judgment and decree, from the 1st day of January, 1899, to the 1st day of November, 1899; that said judgment and decree ever since has been and still is in full force and effect.

Wherefore, defendants pray that plaintiff take nothing by his action, and that they have judgment for their costs.

Dated, Aug. 28th, 1902.

THEO. J. ROCHE,
SULLIVAN & SULLIVAN,
Attys. for Defendants.

State of California,
City and County of San Francisco. } ss.

C. F. Buckley, of said city and county, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing amendment and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and that as those matters that he believes it to be true.

C. F. BUCKLEY.

Subscribed and sworn to before me this 28th day of August, 1902.

[Seal] JOHN P. CASHIN,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed August 28, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States for the Northern District of California.

HENRY A. CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY, et al.,
Defendants.
No. 12,884.

Verdict.

We, the jury, find in favor of the plaintiff, and assess the damages at the sum of five thousand dollars.

EUGENE P. MURPHY,
Foreman.

[Endorsed]: Filed August 30, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

HENRY A. CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants.
No. 12,884.

Judgment on Verdict.

This cause having come on regularly for trial on the 28th day of August, 1902, being a day in the July, 1902, term of said court before the Court, and a jury of twelve men duly impaneled and sworn—Michael Mullaney and Charles Cushing, Esqs., appearing as attorneys for the plaintiff, and Matthew I. Sullivan, Theodore J. Roche and D. M. Delmas, Esqs., appearing as attorneys for the defendants—and the trial having been proceeded with, and evidence oral and documentary on behalf of the respective parties having been introduced, and the cause, after arguments of the attorneys, and the instructions of the Court having been submitted to the jury, and the jury, after due deliberation having returned the following verdict, which was ordered recorded, viz.: "We the jury find in favor of the plaintiff, and assess the damages at the sum of five thousand dollars," and the Court having ordered that judgment be

entered herein in accordance with said verdict, and for costs:

Now, therefore, by virtue of the law, and by reason of the premises aforesaid, it is considered by the Court that said plaintiff, Henry A. Crane, do have and recover of and from said defendants, Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins, the sum of five thousand dollars ($5,000.00), together with his costs in this behalf expended, taxed at $100.90.

Judgment entered August 30, 1902.

SOUTHARD HOFFMAN,
Clerk.

A true copy.

[Seal] Attest: SOUTHARD HOFFMAN,
Clerk.

By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Filed Aug. 30, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

HENRY A. CRANE,
vs.
CORNELIUS F. BUCKLEY, et al. } No. 12,884.

Certificate to Judgment-Roll.

I, Southard Hoffman, clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the fore-

going papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court, this 30th day of August, 1902.

[Seal] SOUTHARD HOFFMAN,
Clerk.

By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Judgment-roll. Filed August 30th, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to wit, the November term, A. D. 1902, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday the 8th day of December in the year of our Lord one thousand nine hundred and two—Present: The Honorable CHARLES B. BELLINGER, District Judge, District of Oregon, designated to hold and holding said Circuit Court.

HENRY A. CRANE,
vs.
CORNELIUS F. BUCKLEY et al. } No. 12,884.

Order of Court Directing Plaintiff to Remit Certain Amount of Judgment, etc.

Pursuant to and in accordance with the opinion of Honorable James H. Beatty, District Judge, District of

Idaho (before whom the cause was tried) this day filed, it is ordered that plaintiff, within fifteen days after services of this order, file with the clerk of this court his written consent to remit from the verdict rendered herein, the sum of two thousand dollars, and his acceptance of a judgment in his favor of three thousand dollars, and that before filing such consent and acceptance he exhibit the same to or serve a copy thereof upon defendants' counsel, and that if plaintiff fails or refuses to so file such consent and acceptance within the time above allowed, that the motion of defendants for a new trial then be granted.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

HENRY A. CRANE,

Plaintiff,

vs.

CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,

Defendants.

No. 12,881.

Stipulation Remitting Portion of Judgment.

It is hereby consented by and on behalf of plaintiff herein that the sum of two thousand (2000) dollars be and the same is hereby remitted from the amount of the verdict and judgment heretofore rendered and entered

herein and said plaintiff accepts a judgment in his favor of three thousand dollars ($3,000) herein.

Dated December 12th, 1902.

HENRY A. CRANE,
Plaintiff.

MULLANY, GRANT & CUSHING,
Attorneys for Plaintiff.
104 Sutter St., San Francisco, Cal.

[Endorsed]: We, the undersigned hereby acknowledge that plaintiff this day exhibited the within consent and acceptance to us and served a copy thereof on us before filing.

Dated Dec. 12, 1902.

THEO. J. ROCHE,
SULLIVAN & SULLIVAN,
Attorneys for Defendants.

Filed December 13, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

HENRY A. CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants.
No. 12,884.

Order Refusing New Trial.

In this action the Court, having heretofore made an order, that the defendants' motion for a new trial be granted unless the plaintiff, within fifteen days after service of such order, file with the clerk of this Court his written consent to remit from the verdict the sum of two thousand ($2,000) dollars, and his acceptance of a judgment in his favor of three thousand ($3,000) dollars, and that before filing such consent and acceptance, he exhibit the same to, or serve a copy thereof upon, defendants' counsel, and plaintiff having duly filed such consent, with due proof of service thereof, within said fifteen days, it is ordered that defendants' motion for a new trial herein be and the same is, hereby denied.

Dated December 16, A. D. 1902.

JAS. H. BEATTY,
Judge.

[Endorsed]: Filed December 20, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

Mandate of United States Circuit Court of Appeals, Remanding Cause for a New Trial.

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Honorable Judges of the Circuit Court of the United States for the Northern District of California, Greeting:

[Seal]

Whereas, lately in the Circuit Court of the United States for the Northern District of California, before you, or some of you, in a cause between Henry A. Crane, plaintiff, and Cornelius F. Buckley, Rudolph Spreckels, and Timothy Hopkins, defendants, No. 12,884, a judgment was duly filed and entered on the 30th day of August, 1902, in favor of the said plaintiff and against the said defendants; which said judgment is of record in the said cause in the office of the clerk of the said Circuit Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of a writ of error agreeably to the act of Congress in such cases made and provided, fully and at large appears:

And whereas, on the 4th day of March, in the year of our Lord one thousand, nine hundred and three, the

said cause came on to be heard before the said Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs, and the cause remanded to the said Circuit Court for a new trial.

(May 25, 1903.)

You, therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the opinion and judgment of this Court and as according to right and justice and the laws of the United States ought to be had, the said judgment of said Circuit Court notwithstanding.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 19th day of October, in the year of our Lord one thousand nine hundred and three. F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

COSTS OF PLAINTIFFS IN ERROR:

Transcript, paid Clerk below.....	$126.50
Clerk U. S. Circuit Court of Appeals...	$ 25.45
Printing Record.....	$ 70.50
Attorney's Docket Fee.....	$ 20.00
Taxed at	$242.45

F. D. MONCKTON,
Clerk.

[Endorsed]: No. 12,884. In U. S. Circuit Court, N. D. California. No. 938. United States Circuit Court of Appeals, for the Ninth Circuit. Cornelius F. Buckley et al., vs. Henry A. Crane. Mandate. Filed and spread on Minutes U. S. Circuit Court, Northern District of California, October 27, 1903. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of Califorina.

HENRY A. CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY et al.,
Defendants.

Amendment to Answer.

Now come the defendants in the above-entitled action and by leave of Court first had and obtained file this, their amendment to their answer as amended on file herein, and deny and allege as follows, to wit:

Deny that the said Cornelius F. Buckley continued until the 4th day of November, A. D. 1899, or was at any time after the 31st day of October, A. D. 1899, in the exclusive possession, use and occupation of all or any part of said real property, water ditches, water rights or rights of way described in said judgment and decree, a copy of which is annexed to and made a part of plaintiff's complaint, and therein marked Exhibit "A."

Deny that on the 4th day of November, A. D. 1899, and not until said day, the possession of said property described in said judgment and decree was delivered by said defendant, Cornelius F. Buckley, to plaintiff herein.

And in this connection these defendants allege that prior to the 1st day of November A. D. 1899, the said Cornelius F. Buckley tendered to the above-named plaintiff and offered to give and surrender to him the possession of all of said real property, water ditches, water rights and rights of way aforesaid on the 1st day of November, A. D. 1899; and that thereafter, and on the said 31st day of October, A. D. 1899, the said Cornelius F. Buckley gave up, surrendered and went out of the possession, use and occupation of all of said real property, water ditches, water rights and rights of way described in said judgment and decree, a copy of which is annexed to and made a part of plaintiff's complaint.

Wherefore, defendants pray that plaintiff take nothing by his said action, and that they have judgment for their costs.

Dated August 17th, 1904.

THEODORE J. ROCHE,
SULLIVAN & SULLIVAN,
Attorneys for Defendants.

State of California,
City and County of San Francisco. } ss.

Cornelius F. Buckley, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing amend-

ment to answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and that as to those matters he believes it to be true.

C. F. BUCKLEY.

Subscribed and sworn to before me, this 17th day of August, A. D. 1904.

[Seal] W. B. BEAIZLEY,

Deputy Clerk U. S. Circuit Court, Northern District of California.

[Endorsed]: Filed August 17, 1904. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, for the Northern District of California.

HENRY A. CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY et al.,
Defendants.
No. 12,884.

Verdict.

We, the jury, find in favor of the defendants.

JENKS F. NESMITH,
Foreman.

[Endorsed]: Filed August 17, 1904. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, for the Northern District of California.

HENRY A. CRANE,

Plaintiff,

vs.

No. 12,884.

CORNELIUS F. BUCKLEY, RUROLPH SPRECKELS and TIMOTHY HOPKINS,

Defendants.

Judgment on Verdict.

This cause having come on regularly for trial upon the 16th day of August, 1904, being a day in the July, 1904, term of said Circuit Court, before the Court and a jury of twelve men duly impaneled and sworn—Charles and Oscar K. Cushing, Esqs., appearing as attorneys for plaintiff, and Theodore J. Roche and D. M. Delmas, Esqs., appearing as attorneys for the defendants—and the trial having been proceeded with upon the 17th day of August, 1904, and evidence, oral and documentary, upon behalf of the respective parties, having been introduced, and the evidence having been closed, and the cause, after the instructions of the Court, having been submitted to the jury, and the jury after due deliberation, having rendered the following verdict which was ordered recorded, viz: "We, the jury, find in favor of the defendants. (Signed) "Jenks F. Nesmith, Foreman," and the Court having ordered that

judgment be entered herein in accordance with said verdict and for costs:

Now, therefore, by virtue of the law, and by reason of the premises aforesaid, it is considered by the Court, that plaintiff take nothing by this action; that defendants go hereof without day, and that defendants recover from plaintiff their costs in this behalf expended, taxed at $153.80.

Judgment entered August 17, 1904.

SOUTHARD HOFFMAN,
Clerk.

A true copy.

[Seal] Attest: SOUTHARD HOFFMAN,
Clerk.

By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Filed August 17, 1904. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

HENRY A. CRANE,
Plaintiff,

vs.

CORNELIUS F. BUCKLEY et al.,
Defendants.

No. 12,884.

Certificate to Judgment-roll.

I, Southard Hoffman, clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, North-

ern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court, this 17th day of August, 1904.

[Seal] SOUTHARD HOFFMAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Judgment-roll. Filed August 17, 1904. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

HENRY A. CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY, RUROLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants.
No. 12,884.

Opinion on Motion to Remand Cause.

Monday, December 10, 1900.

MULLANY, GRANT & CUSHING, Attorneys for Plaintiff.

SULLIVAN & SULLIVAN, and THEODORE J. ROCHE, Attorneys for Defendants.

MORROW, Circuit Judge:

It appears that an action was brought by the above-named plaintiff against the defendant Cornelius F. Buckley, in the Circuit Court of the United States for the Southern District of California, wherein a judgment was rendered in favor of the plaintiff, but allowing the defendant the equitable privilege of completing the purchase of certain of plaintiff's property in accordance with the terms of a certain agreement, and specifying January 1, 1899, as the limit of duration of such privilege. From this judgment an appeal was taken to the United States Circuit Court of Appeals, a bond being given by the defendants herein (C. F. Buckley as principal, and Rudolph Spreckels and Timothy Hopkins as sureties) in the sum of $8,000, wherein it was recited:

"Now, the condition of the above obligation is such, that if the said C. F. Buckley shall prosecute his appeal to effect, and shall answer all damages and costs that have been and shall be awarded against him if he fails to make his appeal good, and if he shall answer all damages that shall accrue to the said respondent by reason of the value of the use and occupation of the land and premises from the time of said appeal, until the delivery of possession thereof to said Henry A. Crane, and for all waste committed thereon, then the above obligation to be void; else to remain in full force and effect."

On October 2, 1899, the Circuit Court of Appeals affirmed the judgment of the lower court, and upon October 19, 1899, on the hearing of a petition for a rehearing of the case, modified its former decree, as follows:

"Cause remanded to the court below with directions to substitute for the 1st day of January, 1899, the 1st day of November, 1899, within which the payments therein provided for are permitted to be made, and, as so modified, the decree is affirmed."

The defendant Buckley did not complete the purchase of the property by making the payments above referred to, and on or about the day specified in said modified decree surrendered the possession of said property to the plaintiff.

Plaintiff then brought suit in the Superior Court of the State to recover from the defendants herein, upon their said bond, the value of the use and occupation of said property from the 1st day of January, 1899, to the 1st day of November, 1899 (the extension of time allowed by the Court of Appeals within which to make payments in completion of purchase, under agreement), and for recovery of damages sustained by reason of waste committed upon said property by the defendant Buckley during said time. Upon the petition of the defendants, the suit was transferred to this court, upon the allegation that the determination of their liability upon said bond depends upon the construction of an act of Congress, namely, section 1000 of the Revised Statutes. The case is now before this court upon plaintiff's motion to remand the cause to the State court.

In support of this motion, the plaintiff contends that the defendant's liability arises exclusively under their own contract as contained in the supersedeas bond, and therefore the determination of such liability is not de-

pendent upon the construction of any United States law.

The section of the Revised Statutes upon the construction of which the jurisdiction of this court is sought to be established, is the following:

"Sec. 1000. Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution."

* * *

The writ in this case was a supersedeas, and the security given therefore extended to damages as well as to costs. The question for determination is, Has this court jurisdiction of the action?

It has been held that such a controversy is one springing out of a suit already determined in the federal court, and is in one sense an offshoot of that suit. Seymour vs. Phillips & Colby Const. Co., Fed. Cas. 12,689, 7 Bliss. 460. And further, in the same case, that a supersedeas bond is an indemnity given in pursuance of a law of the United States; the measure of the liability of the party, and the rights of both plaintiff and defendant, depend upon a law of the United States and a rule of the Supreme Court of the United States (No. 29). It is impossible to take a step in the progress of a suit brought upon such a bond in order to determine the

rights of the parties, without looking at the law and the rule as the guide of the court, and controlling its judgment in the determination of the case.

And in Arnold vs. Frost, Fed. Cas. No. 558, 9 Ben. 267, a suit for recovery on a bond given on appeal, the Court in positive terms declared it to be, not an original suit, but an offshoot or out-branch of the suit in which the bond was given, and that jurisdiction of the original suit gave jurisdiction over the subject matter of the suit on the bond.

The action under consideration is based upon proceedings in the United States Circuit Court acting under authority conferred by a law of the United States and a rule of the Circuit Court of Appeals (No. 13.) It therefore presents a question arising under the laws of the United States, and so within the jurisdiction of this court.

First Natl. Bank vs. Society, etc., 80 Fed. 581.

Upon the doctrine announced in the foregoing cases, the motion to remand the cause to the State court will be denied.

[Endorsed]: Filed December 10, 1900. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

HENRY CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants.

Opinion on Motion for a New Trial.

In the above-entitled cause the jury returned a verdict of five thousand dollars against the defendant, who now moves for a new trial, assigning with other reasons, the insufficiency of the evidence to justify the verdict, and, the alleged errors of the court at the trial. I am not convinced that such errors were committed by the court, as controlled the verdict, hence not such as to justify the motion for a new trial, but that the evidence did not justify the amount of the verdict, I have at no time doubted. I was much surprised at the conclusion reached by the jury, and had not expected a verdict for over about half what was found.

It is unnecessary to review the evidence, only calling attention to the fact that the plaintiff subsequently rented the premises for a term of five years at something less than

fifteen hundred dollars per annum, and to the testimony of the numerous, apparently competent and disinterested witnesses for defendant, who estimated the rental value for ten months in question, at this sum and less.

The machinery had been so long in use that I can not think, from all the testimony, it could have been at the time of its removal, or a value to exceed one thousand to fifteen hundred dollars.

While my own impression at the trial was, and still is, that twenty-five hundred dollars would be a fair verdict, yet with due respect to the verdicts of juries, I conclude that I should so far yield to the superior judgment of twelve men as to admit that a verdict of three thousand dollars might follow from a full consideration of all the testimony.

The order therefore is, that plaintiff within fifteen days after the service of this order, file with the clerk of this court, his written consent to remit from the verdict, the sum of two thousand dollars, and his acceptance of a judgment in his favor, or three thousand dollars, and that before filing such consent and acceptance, he exhibit the same to, or serve a copy thereof, upon defendant's counsel, and that if plaintiff fails or refuse to so file such consent and acceptance within the time above allowed, the motion of defendant for a new trial, is granted.

Dated this 5th day of December, 1902.

JAS. H. BEATTY,
Judge.

[Endorsed]: Filed Dec. 8, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

HENRY CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY et al.,
Defendants.
No. 12,884.

Plaintiff's Engrossed Bill of Exceptions.

Be it remembered that the above-entitled action came on for trial before the above-entitled court, Honorable W. W. Morrow, Judge, presiding therein, on the 16th day of August, 1904; Messrs. Mullany, Grant & Cushing, appearing as attorneys for the above-named plaintiff; Messrs. Sullivan & Sullivan, Theo. J. Roche, Esq., and D. M. Delmas, Esq., appearing as attorneys for the defendants therein. A jury was thereupon duly impaneled to try said action and thereupon the following proceedings were had. Defendants moved said Court for an order permitting them to file an amendment to their answer and counsel for plaintiff objected to the granting of an order permitting said amendment on the ground that the case had been pending for between four and five years and that the nature of the amendment was to deny something which was heretofore always admitted by the defendants; after argument, the Court made an order permitting defendants to file said amendment, which amendment was filed on the

17th day of August, 1904. To the granting of said order permitting said amendment plaintiff then and there duly excepted.

Exception No. 1.

Thereupon counsel for plaintiff made an opening statement to the Court and jury and explained the nature and character of the claim and the issues to be tried. Thereupon plaintiff offered in evidence a certified copy of the opinion of the United States Circuit Court of Appeals, duly certified, in the case of Henry A. Crane vs. C. F. Buckley, which is the same case mentioned in plaintiff's complaint. Said opinion was thereupon read in evidence and was and is in words and figures following, to wit:

["Title of Court and Cause—No. 509.]

Appeal from the Circuit Court of the United States, for the Southern District of California.

Before GILBERT, ROSS and MORROW, Circuit Judges.

ROSS, Circuit Judge, delivered the opinion of the Court:

This suit was commenced by the appellee, Henry A. Crane, against the appellant, C. F. Buckley, in the Superior Court of Tulare County, California, from which, on motion of the defendant, it was transferred to the court below. The suit was upon a contract for the sale and purchase of a certain tract of land situated in Tulare County. The complainant alleges a violation on the part of the vendee of the terms of the contract, and prayed a foreclosure of his rights and interests thereunder, and a recovery of the possession of the property from him. The

defendant answered the bill of complaint, and also filed a cross-bill, in which he alleged that the execution of the agreement of sale sued upon was induced on his part solely by false and fraudulent statements and misrepresentations made to him by the complaint, and one Thomas Hayes, regarding the character and value of the property in controversy, and in pursuance of a conspiracy between Crane and Hayes. The case was tried in the court below upon this issue of fraud, resulting in a judgment dismissing the cross-bill, and awarding the complainant the relief prayed for. The present appeal is from that judgment. The record is a very voluminous one, and has received careful consideration. The Court below was of the opinion that the evidence did not sustain the charges contained in the cross-bill. We are of the same opinion. To review the evidence in detail, however, would serve no useful purpose, so nothing more need be said.

The judgment is affirmed.

[Endorsed]: Opinion. Filed Oct. 2, 1899. F. D. Monckton, Clerk.

(Duly certified.)

[Endorsed]: No. —— United States Circuit Court of Appeals for the Ninth Circuit. No. 12,884. U. S. Circuit Court, N. D., Cal. Crane vs. Buckley, Plffs. Exhibit "A." Aug. 16, 1904. W. B. B., Dep. Clerk."

Plaintiff thereupon offered in evidence the opinion and decision of said U. S. Circuit Court of Appeals in passing upon the application of said C. F. Buckley for a rehearing in said action. The same was thereupon received

and read in evidence and was and is in words and figures following, to wit:

["Title of Court and Cause—No. 509.]

Appeal from the Circuit Court of the United States for the Southern District of California.

Before GILBERT, ROSS and MORROW, Circuit Judges.

By the COURT.—In this case the appellant has filed a petition praying for a re-hearing as to a part of the judgment given herein on the 2d day of October, 1899, or for such a modification thereof as will allow the appellant until the first day of November, 1899, within which to make the payments required by the decree from which the appeal was taken. This petition is based upon the fact that the appellant make large payments under the contract of sale for the foreclosure of which the suit was brought and upon the claim that the appeal was taken and prosecuted by him in good faith and in the honest belief that his allegations of fraud in the making of the contract were well founded. The record does show that the appellant made large payments under the contract and that he has made other large expenditures in the improvement of the property which was the subject of the contract. It is also true that the sums remaining due from the appellant under the contract were large. These payments the decree of the Court below, which was entered on the 16th day of November, 1898, required to be made prior to Jaanary 1st, 1899, in order that the rights and interests of the appellant in the property be saved, which

were by the decree otherwise forever foreclosed and ended. Under the circumstances appearing in the record this Court is of the opinion that it is equitable and just to allow the appellant until the 1st day of November, 1899, within which to make the payments required by the decree from which the appeal is taken, and, accordingly, it is ordered that the judgment of this Court entered herein on the 2d day of October, 1899, be, and hereby is, so modified as to read: Cause remanded to the Court below with directions to substitute for the first day of January, 1899, the first day of November, 1899, within which the payments therein provided for are permitted to be made, and, as so modified, the decree is affirmed.

The petition for a rehearing of the cause is denied.

[Endorsed]: Opinion on Rehearing and Modification of Decree, etc. Filed October 19, 1899. F. D. Monckton, Clerk.

Duly certified.

[Endorsed]: No. ———. United States Circuit Court of Appeals for the Ninth Circuit. Crane vs. Buckley, et al., Plffs. Ex. "B." Aug. 16, 1904. W. B. B. Dep. Clk."

Plaintiff thereupon offered and read in evidence the mandate issued by said Circuit Court of Appeals in said action directed to the Circuit Court of the United States, wherein said action was tried, which said mandate was and is in words and figures following, to wit:

"UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Honorable, the Judges of the Circuit Court of the United States, for the Southern District of California. Greeting:

Whereas, lately in the Circuit Court of the United States for the Southern District of California, before you, or some of you, in a cause between Henry A. Crane, complainant, and Cornelius F. Buckley, defendant and cross-complainant, No. 765, a decree was duly filed and entered in said cause in said Circuit Court on the 16th day of November, 1898, which said decree is of record in the office of the clerk of said Circuit Court, to which record reference is hereby made and the same is hereby expressly made a part hereof; and, as by the inspection of, the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the act of Congress in such cases made and provided, fully and at large appears:

And whereas, in a term of October, in the year of our Lord one thousand, eight hundred and ninety-nine, the said cause came on to be heard before the said Circuit Court of Appeals, on the said transcript of record, and was argued by counsel.

And whereas, after consideration of said cause, it was on the 2d day of October, A. D. 1899, ordered, adjudged and decreed by this Court that said decree of said Circuit Court so appealed from be affirmed, with costs; and whereas, on the 17th day of October, A. D. 1899, the ap-

pellant filed a petition for a rehearing, which petition was on the 19th day of October, A. D. 1899, denied and the former decree entered herein modified:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that this cause be, and the same is hereby, remanded to the Court below with direction to said Circuit Court to modify its decree herein by substituting for the first day of January, 1899, the first day of November, 1899, within which the payments therein provided for are permitted to be made, and, as so modified, the decree is affirmed, with costs.

October 2, 1899, as amended by order of Court of Oct. 19, 1899.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the opinions and decree of this Court and as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 19th day of October, in the year of our Lord one thousand, eight hundred and ninety-nine.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

COSTS OF APPELLEE.

Attorney's Docket Fee $20.00

Taxed at $20.00

[Seal] F. D. MONCKTON,
Clerk.

[Endorsed]: No. 765. No. 509. United States Circuit Court of Appeals for the Ninth Circuit. October Term, 1899. Henry A. Crane, Appellee, vs. C. F. Buckley, Appellant. Mandate. Filed, Oct. 23, 1899. Wm. Van Dyke, Clerk. (Duly certified.)

[Endorsed]: No. 765. No. 509. United States Circuit Court of Appeals for the Ninth Circuit. October Term, 1899. Henry A. Crane, Appellee, vs. C. F. Buckley, Appellant. Certified Copy of Mandate. No. 12,884. U. S. Circuit Court, N. D. of Cal. Crane v. Buckley et al., Plffs. Exhibit 'C.' Aug. 16, 1904. W. B. B. Dep. Clerk."

Mr. Roche, on behalf of defendants, thereupon offered in evidence a certified copy of a modifying decree, made in the Circuit Court of the United States in and for the Southern District of California in the said action brought by Henry A. Crane vs. C. F. Buckley.

To the introduction of which document counsel for plaintiff then and there objected upon the ground that the question as to whether said C. F. Buckley had prosecuted his appeal to effect was entirely a matter for the upper court to determine and not for the lower court, and that the question as to whether the appeal was prosecuted to effect depended upon the action of the upper court. The Court thereupon overruled the objection, to which ruling the plaintiff then and there duly excepted.

Exception No. 2.

The said decree was thereupon read in evidence and the same was and is in words and figures following, to wit:

["Title of Court and Cause.]

Decree Modifying Former Decree.

In the above-entitled cause, pursuant to the mandate of the United States Circuit Court of Appeals for the Ninth Circuit, bearing date the 19th day of October, 1899, and entered herein on the 23d day of October, 1899;

It is hereby ordered, adjudged and decreed that the former decree of this Court made and entered herein on the 16th day of November, 1898, be and the same is hereby modified by substituting for the words and figures 'first (1st) day of January, one thousand eight hundred and ninety-nine,' where the same occur, on pages 4, 5 and 6 of said former decree, the words and figures 'first (1st) day of November, 1899.'

Done in open court this 23d day of October, 1899.

OLIN WELLBORN,
District Judge.

Decree entered and recorded October 23d, 1899.

WM. M. VAN DYKE,
Clerk.

[Endorsed]: No. 765. In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California. Henry A. Crane, Complainant, vs. C. F. Buckley, Defendant. Decree Modifying Former Decree. Filed Oct. 23, 1899. Wm. M. Van Dyke, Clerk. Borden & Carhart, Rooms 426 to 431, Stimson Block, Los Angeles, California, Attorneys for ———. (Duly exemplified.) Defendant's Exhibit No. 1. Aug. 16, 1904. W. B. B. Dep. Clk."

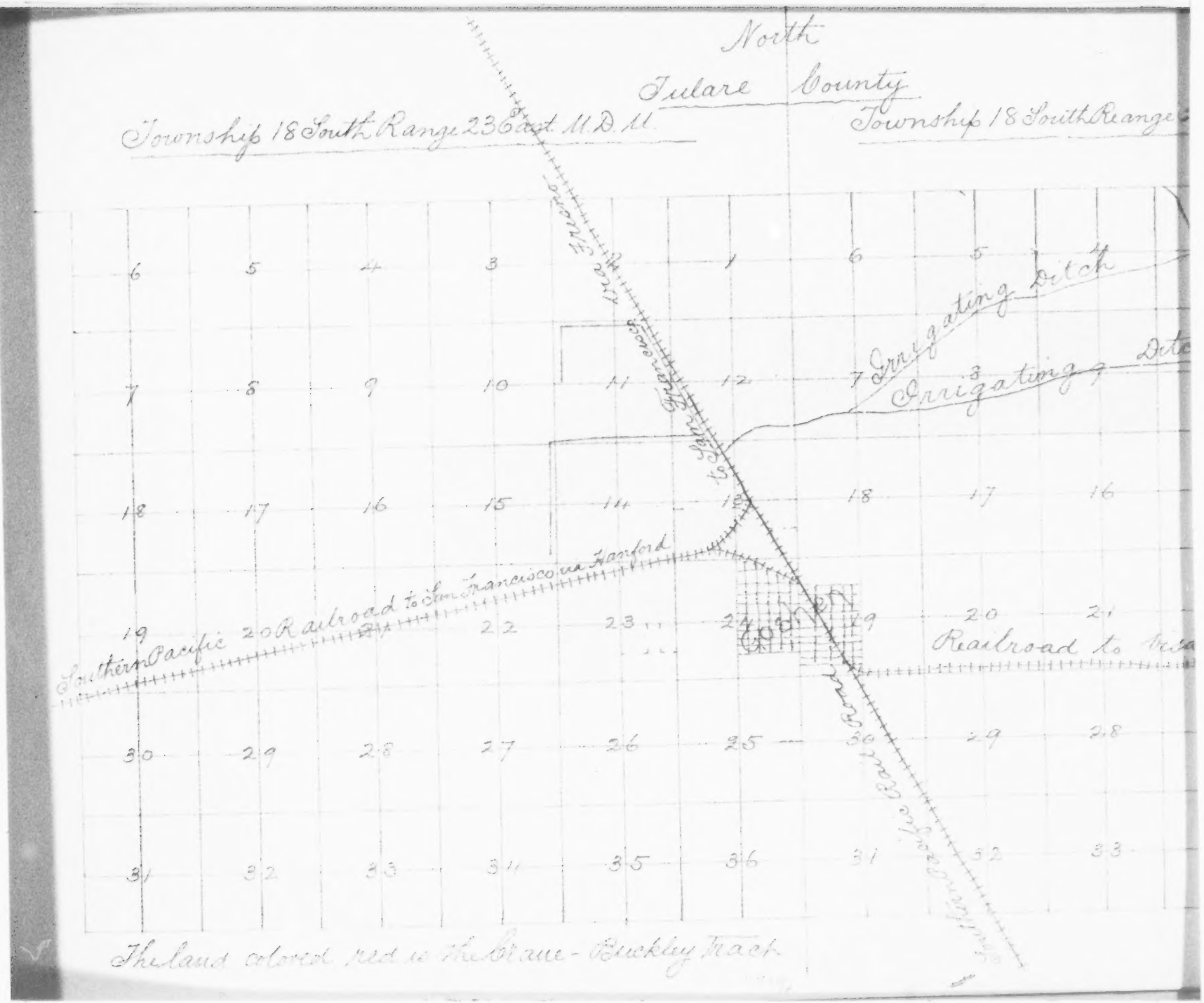
HENRY A. CRANE, the plaintiff in said action, was thereupon duly sworn in his own behalf, and testified and was examined as follows:

"I am the plaintiff in this action. I know the defendant therein, C. F. Buckley, and have known him since August 11, 1887. He is the person with whom I have had some contractual relations about land in Tulare County. I know the tract of land known as the Crane tract and sometimes as the Crane-Buckley tract situate near Goshen in Tulare County, in this State. I have known that tract of land since June, 1883. I am now in the possession of it and am the owner of it. It is the same tract of land described in Exhibit 'A' which is annexed to and forms a part of the complaint in this action." Mr. Cushing, counsel for plaintiff, here produced a diagram representing the Crane-Buckley tract of land, hereinbefore referred to, and it was thereupon admitted by counsel for the respective parties to the action that the diagram correctly represents the Crane-Buckley tract of land to which the witness referred in his testimony hereinbefore set forth. Mr. Crane, the witness, further testified as follows:

"On this diagram now shown to me the part marked in red represents the Crane tract, which is described in the complaint herein. The squares marked on the diagram and numbered, represent sections according to the United States surveys. The line drawn diagonally from the top to the bottom of the map represents the main line of the Southern Pacific Railroad running

(Testimony of Henry A. Crane.)

from Los Angeles to San Francisco. The point on the middle of the diagram marked, 'Goshen' represents the town of Goshen in Tulare County. The line running westerly on the map marked 'Southern Pacific Railroad to San Francisco via. Hanford' is the railroad. The dark lines marked 'irrigating ditch' represent the irrigating ditches on that tract." The said diagram was thereupon offered and received in evidence and was marked "Plaintiff's Exhibit 'D,' August 16, 1904, W. B. B., Depy. Clerk," and the same is next hereinafter set forth.


North
Tulare County
Township 18 South Range 23 East M.D.M.
Township 18 South Range
Irrigating Ditch
Irrigating Ditch
Irrigating
Southern Pacific Railroad to San Francisco via Hanford
Railroad to
The lands colored red is the Stone-Buckley Tract

North
Tulare County
Range 23 East M D M
Township 18 South Range 24 East M D M
Irrigating Ditch
Irrigating Ditch
Kaweah River
Kaweah River
San Francisco via Hanford
Railroad to Visalia
Kaweah River
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(Testimony of Henry A. Crane.)

It was here admitted by the counsel for the respective parties to the action that defendant, C. F. Buckley, did not, after the final decision was rendered on the appeal in the foreclosure case in the United States Circuit Court of Appeals, being the action in which the opinions and judgment were rendered as hereinbefore in this bill of exceptions set forth, or at any time or at all, pay to plaintiff herein the amount of money designated in the judgment as being due to plaintiff, or any part thereof. The witness further testified: "Defendant Buckley never tendered or ordered to pay me that amount due to me under the decree or any part of it. I lived on the land described in the complaint and in the diagram which has been offered and received in evidence from about the middle of 1883, until along in January, 1885. During that time I farmed the land and sold and disposed of the produce therefrom. I am familiar with that tract of land and have been at all times since that time. Since I went into possession of that land on or about the early part of November, 1899, I have from time to time rented it out, and collected the rent from it. I have owned other farm land from time to time in the State of California and have lived on the same. From my knowledge in connection with the Crane-Buckley tract in renting it out I know the value of the use and occupancy of that land."

Q. (By Mr. CUSHING.) State, Mr. Crane, what was the value of the use and occupancy of that land from

(Testimony of Henry A. Crane.)

the 3d day of January, 1899, to the 4th day of November, 1899?

Mr. ROCHE.—I object to the question on the ground that in so far as it covers the period between the 3d day of January, 1899, and on the first day of November, 1899, the question is incompetent, immaterial and irrelevant.

Exception No. 3.

The objection was sustained by the Court, to which ruling the plaintiff then and there duly excepted.

Q. What was the value from your knowledge of the use and occupancy of that land from the 3d day of January, 1899, to the first day of November, 1899.

Exception No. 4.

Counsel for defendant made the same objection heretofore interposed to the next preceding question, which was sustained by the Court, to which ruling counsel for plaintiff then and there duly excepted.

(Witness continuing:) "From my actual knowledge of that land the value of the use and occupancy of it from the first day of November, 1899, to the fourth day of November, 1899, would be a pro rata of the yearly rental which was $5,500. The value of the use and occupancy of that tract of land from November 1st to November 4th, 1899, was $100." Counsel for plaintiff thereupon, while said witness was on the witness-stand offered to prove by said witness "that the value of the use and occupation of the real property described in

(Testimony of Henry A. Crane.)

the judgment and decree, a copy of which is annexed to and made a part of the complaint on file herein and marked Exhibit 'A' from the third day of January, 1899, to the 4th day of November, 1899, was and is the sum of over $5,500." To this offer counsel for defendants objected on the same grounds upon which they objected to the former questions asked said witness about the value of the use and occupancy of said land, which are hereinbefore set forth. The Court sustained said objection, to said offer to which ruling counsel for plaintiff then and there excepted.

Exception No. 5.

Q. (By Mr. CUSHING.) Mr. Crane, when were you last on that ranch prior to the first day of January, 1899?

A. On the 7th day of December, 1898.

Q. Will you state, Mr. Crane, what there was on that ranch at that time of the various articles and materials referred to in the complaint herein which are therein stated and claimed to be fixtures?

Mr. ROCHE.—I think, in view of the fact that I am familiar with the records, that if counsel will state in the offer what he expects to prove by the witness, as to when the alleged waste was committed on the land, we can then raise the legal question that your Honor will have to determine, and in all probability accelerate the trial of this case. If I am correct, counsel intends to show that between the first day of January, 1899,

(Testimony of Henry A. Crane.)

and the first day of November, 1899, certain waste was committed by Dr. Buckley, or those in charge of these premises for Dr. Buckley—that is correct, is it not? Mr. Cushing—and that no waste was committed between the first day of November, 1899, and the 4th day of November, 1899. If counsel will make that offer in connection with this testimony, I think it will save a great deal of time, and your Honor can then pass on the question whether or not, under the pleading and proof as they now exist, any waste can be recovered whatever. We take the position that Dr. Buckley having prosecuted his appeal to effect, therefore that the sureties on his bond have been relieved from any liability whatever for any waste committed by Dr. Buckley prior to the first day of November, 1899.

Mr. CUSHING.—We offer to prove, if your Honor please, that the materials described in the complaint here which are claimed to be fixtures, were affixed to the premises, as in the complaint stated, at the date this bond was given, which was the 3d day of January, 1899, and that between that time and the first day of November, 1899, they were removed therefrom by Dr. Buckley, and that the damages therefrom consisted of the amount of $2,500. That is the offer, Mr. Roche.

Mr. ROCHE.—To that offer, may it please the Court, we object upon the ground that the offer itself, and the evidence which will be put in to substantiate that offer, is immaterial, incompetent and irrelevant; that the

(Testimony of Henry A. Crane.)

record proofs already put in evidence on behalf of the plaintiff and on behalf of the defendants, show conclusively that the defendant, C. F. Buckley, in the original case of Crane vs. Buckley, did prosecute his appeal to effect, and that whatever waste was committed prior to the first day of November, 1899, if any was committed, was not committed by virtue of any supersedeas bond filed by Dr. Buckley in that case, but by virtue of the right which Dr. Buckley had to the possession of those premises, pursuant to the contractual relation existing between himself and Mr. Crane prior to the time it merged into judgment, and subsequent to the judgment as modified by the Circuit Court of Appeals.

Mr. CUSHING.—(Addressing Mr. Roche.) I understand, Mr. Roche, the admission that you made is that the various fixtures and articles that are referred to in the complaint as "fixtures" were on the premises described in Exhibit "A" to the complaint and fixed in place on the 3d day of January, 1899, the day on which that bond was given.

Mr. ROCHE.—That is a pretty strong admission. I would suggest that Mr. Cushing offer to prove that, in connection with his other offer, and we will make the objection to the entire offer.

The COURT.—(Addressing Mr. Cushing.) You can make your offer now.

It was thereupon stipulated by counsel for defendants that no objection was or would be made to the

(Testimony of Henry A. Crane.)

competency of the witness, Henry A. Crane, then on the witness-stand, to make proof of the matters covered by the offers to prove herein made and that said witness was competent to prove the matters embraced within said offers.

Mr. CUSHING.—We offer to prove by the witness, Mr. Henry A. Crane, that the defendant, Cornelius F. Buckley, caused and committed waste upon and of said real property described in said judgment and decree, a copy of which is annexed to and made a part of the complaint on file herein, and is marked Exhibit "A," between the 3d day of January, A. D. 1899, and the first day of November, A. D. 1899, to the extent of and in the amount of over $2,500.

Mr. ROCHE.—To that we object upon the ground that the offer is incompetent, immaterial and irrelevant, and upon the further ground that the record proof already introduced in evidence on behalf of the parties conclusively establishes the fact to be that Dr. C. F. Buckley, in the original case of Henry A. Crane against himself, referred to in plaintiff's complaint, and the judgment rendered in which is the foundation of this suit, did prosecute his appeal to effect, and for that reason the sureties on the supersedeas bond given by

(Testimony of Henry A. Crane.)

him on appeal to the Circuit Court of Appeals have been released from all obligation or liability.

Exception No. 6.

The Court sustained the objection made by counsel for defendants to which ruling plaintiff then and there duly excepted.

Mr. CUSHING.—We also offer to prove by this witness, his competency being conceded, "that said waste consisted in tearing up, severing and removing from said real property a steam boiler, engines, machinery and appurtenances which were, up to the time of the tearing up, severing and removal thereof, built in brickwork and affixed to said real property, and formed a part thereof and were built, placed and constructed for use, and were used, in and for the purpose of carrying on and operating a creamery thereon; and also in tearing up, severing and removing from said real property three water pumps, with windmill and tower affixed to each for working the same, and also two other water pumps with a horse-power machine affixed to each for working the same, and also two other water pumps, all of which were built, placed and constructed for use, and were used for pumping water from water-wells, and all of which were set in and affixed to said real property, and formed a part thereof."

(Testimony of Henry A. Crane.)

Exception No. 7.

To the said offer, Mr. Roche, on behalf of said defendants made the same objection made by him to the next preceding offer. The Court sustained said objection to which ruling plaintiff then and there duly excepted.

(The witness continuing:) "In the complaint in this action I claim damages to the extent of $8,000. No part of that sum has ever been paid. I received possession of the premises described in the complaint and designated in Exhibit 'A' in the decree from Dr. Buckley on November 4, 1899. I left San Francisco on November 3d, 1899, for the purpose of receiving possession of the premises. I received notice on November 2, 1899, that defendant, Buckley, would turn over the premises to me. I have this notice with me. [Witness here produces same.] Pursuant to the notice which I now produce I went to Goshen to the ranch in question and arrived on November 4th, 1899, and took possession of the premises on that day." It was here admitted by counsel for defendant that the notice so produced was signed by defendant Buckley, and that Theodore J. Roche, counsel for defendants, wrote thereon the names "Theodore J. Roche, Henry E. Highton, Sullivan & Sullivan, Solicitors for the Respondent and Cross-complainant," where the same appeared thereon. The said document was thereupon offered and received in evidence and was marked, "Plffs. Ex. 'E.' W. B. B., Dep. Clerk, August 17, 1904," and was and is in words and figures following, to wit:

"*In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California.*

HENRY A. CRANE,
Complainant,
vs.
No. 765.
CORNELIUS F. BUCKLEY,
Respondent and Cross-Complainant.

San Francisco, California, November 2d, A. D. 1899.

Henry A. Crane, Complainant in the Above-entitled Suit:

You are hereby notified by me, Cornelius F. Buckley, said respondent, that at 10 o'clock, forenoon, on Saturday, the 4th day of November, A. D. 1899, at the dwellinghouse on the lands described in the decree of said Court, given, made and entered in said suit on the 16th day of November, A. D. 1898, I shall turn over and deliver up to you the possession, future use and occupation of the real property, water ditches, water rights and rights of way described in said decree of said Court, and which decree is hereby referred to and made a part hereof; and you are hereby further notified that the actual possession, future use and occupation of said real property, water ditches, water rights and rights of way shall be deemed and considered turned over and delivered up to you by me at said hour of 10 o'clock, forenoon, on Saturday, the 4th day of November, A. D.

(Testimony of Henry A. Crane.)

1899, even although I, or any representative on my behalf, should not then or there be present to deliver the same, and even although you, or any representative on your behalf, should not then or there be present to receive the same.

C. F. BUCKLEY.

THEODORE J. ROCHE,
HENRY E. HIGHTON,
SULLIVAN & SULLIVAN,
Solicitors for Respondent and Cross-Complainant.

[Endorsed]: C. F. Buckley to Henry A. Crane. Delivery of Possession, Future Use and Occupation of Certain Real Property. Dated Nov. 2, 1899. Recorded at the request of H. A. Crane, May 26, 1900, at 6 Min. Past 1 o'clock P. M. in Vol. 3, of Miscellaneous, page 4, Tulare County Records. J. O. Thomas, Recorder. 12884. Plffs. Exhibit "E." W. B. B., Dep. Clerk. Aug. 17, 1904. Duly Acknowledged by C. F. Buckley."

Cross-examination of HENRY A. CRANE.

By Mr. ROCHE.—I did not receive possession of the property described in the decree Exhibit "A" from defendant Buckley, until November 4th, 1899. When I went down to the ranch I did not find anyone in possession of it. The ranch was entirely vacant as far as I can see. I do not recollect meeting Mr. Theodore J. Roche in the office of Mr. Mullany two or three days prior to the first day of November, 1899, in relation to the possession of these premises. I will state that I did

(Testimony of Henry A. Crane.)

not meet him. I did not two or three days prior to the first day of November, 1899, or at any time, have any conversation with Mr. Roche concerning the delivery to me of the possession of these premises. Mr. Mullany was one of the attorneys in the original case brought by me against Cornelius F. Buckley. That was the foreclosure case out of which this action arises. The writing on the back of the notice, which has just been offered in evidence (witness refers to Plaintiff's Exhibit "E" hereinbefore set forth), which is in words as follows: "C. F. Buckley to Henry A. Crane, delivery of possession, future use and occupation of certain real property."

"Dated November 2, 1899," is in the handwriting of Mr. Michael Mullany.

(The witness continuing:) "I do not know where the notice was drawn up."

I base my claim that the value of the use and occupation of the premises described in Exhibit "A" for three days is about $100, upon the fact that the value thereof for the year is $5,500. I was on the ranch a good many times between the month of August, 1887, and the day on which possession of this property was delivered over to me. I would say a dozen or two times. During all those years I knew what the rental value of the premises was. I kept track of the wages and made inquiries to determine the rental value of land in that vicinity. After I got possession of the ranch I made no attempt to rent it to anyone, until I rented it to Miller & Lux in

(Testimony of Henry A. Crane.)

June, 1900. I entered into a written lease with Miller & Lux. I now produce the lease. The lease was produced and was thereupon offered by counsel for defendant and was received in evidence and was marked "Defts. Exhibit No. 2, August 17, 1904. W. B. B., Dep. Clerk." The said lease so received in evidence was dated June 28, 1900, and was made by said Henry A. Crane to Miller & Lux, a corporation, and by the terms thereof all the premises described in Exhibit "A" annexed to the complaint herein was leased to said Miller & Lux for the term of five years and six months from the first day of July, 1900. Said lease also contained the following provisions:

"The lessee shall have the possession, use and occupation of the whole of said demised premises from the first day of July, 1900, to the 31st day of December, 1900, free of rent or any charge therefor. For the remaining five years of the term hereof, the lessee agrees to pay as rent for said demised premises the sum of $1,500 per annum, payable on the first day of July in each of said remaining five years, the first of said annual payments to be made on July 1st, 1901.

The lessee further promises and agrees to enclose all that portion of the demised premises lying westerly of the railroad track of the Southern Pacific Railroad with a wire fence, and the lessor agrees to allow the lessee the sum of $500 toward the expense incurred by the lessee in constructing said fence, and consents that the

(Testimony of Henry A. Crane.)

lessee may retain said sum of $500 out of the first yearly rental above provided to be paid by it to the lessor.

Should the lessee sow alfalfa in any part of said demised premises, the lessor promises and agrees to pay the lessee for said seed at the market rate then prevailing.

The lessee shall have the right to sink wells and construct ditches in any part of said demised premises; also to place troughs, tanks, windmills and other structures thereon. At the end of the term hereof, or sooner termination of this lease, the lessee shall have the right to remove such troughs, tanks, windmills and the pipes connected therewith, and all other structures placed by it upon said land; but the lessee shall not remove the casings of any wells sunk by it upon said premises, or said wire fence above referred to.

The lessee agrees to keep all improvements now on said premises in the same condition as they are now in, reasonable use and wear thereof and damage by fire or the elements excepted, and in case of the destruction or injury in whole or in part of any of said improvements by any cause other than the avoidable carelessness of the employees of the lessee, it shall be under no obligation to restore or repair the same.

It is expressly understood and agreed that the lessee shall have the use and enjoyment of all water which the lessor may be entitled to take and divert from St. Johns River through those certain ditches known as the 'Hyde Ditch' or 'Cross Creek Ditch' and the 'Manning & Mc-

(Testimony of Henry A. Crane.)

Lerie Ditch.' But inasmuch as the extent of the water rights of the lessor have not been judicially ascertained and determined, it is understood and agreed that should the lessee be prevented by judicial proceedings, or by the interference of any person, association or corporation from taking and diverting through said ditches from said river water sufficient, in its judgment, for the proper enjoyment by it of said demised premises, or should the lessee be threatened with judicial or other proceedings, or to be held liable in damages, if it should take and divert through said ditches from said river water sufficient, in its judgment, for the proper enjoyment by it of said demised premises, the lessee may then at any time, at its option, terminate and cancel this lease, and relieve itself from the payment of any rental thereafter to the second party; and in case the lessee shall in pursuance of this provision hereof surrender possession of said demised premises before the expiration of any year in which it shall have paid the full year's rental therefor, a proportionate rebate of rental shall be made by the lessor to the lessee."

(The witness continuing:) "Messrs. Miller & Lux are still in possession of this property pursuant to the terms of that lease. Between the time I received possession of the premises from Buckley early in November, 1899, and the time when I rented it to Miller & Lux I did not make any improvements of any kind on the property."

PETER MALLOCH.

Peter Malloch was thereupon duly sworn as a witness on behalf of plaintiff and testified as follows: "I reside near Goshen in Tulare County, California. I know the plaintiff, Henry A. Crane and the defendant C. F. Buckley. I have known those gentlemen eight or ten years." (It was thereupon stipulated by counsel for the respective parties that the said witness Malloch possessed sufficient qualifications to enable him to testify as to the value of the use and occupation of the premises described in the complaint during the year 1899.) The witness continuing: "I know the tract of land described in the complaint in this action, the Crane-Buckley tract in and around Goshen, and I know that tract during the year 1899."

Q. (By Mr. CUSHING.) Mr. Malloch, what was the value of the use and occupation of that ranch known as the Crane-Buckley tract from the 3d day of January, 1899, to the 4th day of November, 1899?

A. I would say about $3,500.

Mr. ROCHE.—Will you permit me to interpose an objection, Mr. Cushing? I did not hear the question. I object to it on the same grounds urged to the question put to the witness Crane, and ask that the answer of the witness be stricken out.

The COURT.—Strike it out. I will sustain the objection.

(Testimony of Peter Malloch.)

Exception No. 8.

To which rulings and both thereof counsel for plaintiff then and there duly excepted.

Q. (By Mr. CUSHING:) What was the value of the use and occupation of that ranch from the 3d day of January, 1899, to the 4th day of November, 1899.

Mr. ROCHE.—To that question we interpose the same objection.

The COURT.—The same ruling.

Exception No. 9.

Mr. CUSHING.—We will take an exception. That objection we understand, does not go to the competency of the witness.

Mr. ROCHE.—We have admitted the competency of the witness, therefore it is not an element to be considered in the objection.

Counsel for plaintiff thereupon, and while said witness was on the stand, offered to prove by said witness "that the value of the use and occupation of the real property described in the judgment and decree, a copy of which is annexed to and made a part of the complaint on file herein and marked Exhibit 'A' from the 3d day of January, 1899, to the 4th day of November, 1899, was and is the sum of over $5,500," to which offer defendants objected on the same ground upon which they objected to the questions asked Henry A. Crane covering the same offer as hereinbefore set forth.

(Testimony of Peter Malloch.)

Exception No. 10.

The Court sustained the objection to which ruling plaintiff then and there duly excepted.

Q. (By Mr. CUSHING.) Mr. Malloch, you know the condition of that ranch with respect to the value of its use and occupation during the years 1898-1897?

Mr. ROCHE.—That is objected to as being immaterial.

Mr. CUSHING.—We have a deposition here of Mr. Con. O'Neill which shows that he bases his estimate of the value in 1899 on what he knew it to be in 1897-1898. I offer to show by this witness, Peter Malloch, for the purpose of connecting that testimony up, that the ranch was substantially in the same condition and had substantially the same rental value during the year 1899 that it had during the previous years.

The COURT.—Unless it is restricted for the purpose of showing finally the value of the use and occupation for the time between November 1st and November 4th, I shall have to sustain the objection.

Mr. CUSHING.—We offer it for the purpose of showing the value of the use and occupation from the 3d day of January to the 4th day of November, 1899.

Exception No. 11.

The COURT.—"I sustain the objection." To which ruling plaintiff then and there duly excepted.

(The witness continuing:) "I knew the Crane-Buckley Ranch during the year 1898. I have seen on that ranch,

(Testimony of Peter Malloch.)

at the ranch house on same a certain engine, boiler, creamery separator, ice plant and appurtenances. I knew those articles there. I last saw those articles on that ranch during the summer of 1899.

Q. When were they removed from that ranch?

A. They were removed in August, 1899.

Mr. ROCHE.—We move to strike out the answer and testimony given by the witness in connection with it as irrelevant, immaterial and incompetent."

Exception No. 12.

The COURT.—"The motion is granted." To which ruling the plaintiff then and there duly excepted.

Q. (By Mr. CUSHING.) Did you see those articles you have just described on that ranch during the month of December, 1898?

Mr. ROCHE.—We interpose the same objection. Counsel stated yesterday that he intended to prove that these alleged fixtures were removed prior to the first day of November, 1899. No claim is made by the plaintiff that they were removed at any subsequent date; therefore, I take it all of this testimony is immaterial. That is correct, is it not?

Mr. CUSHING.—That is what I stated. I want to show they were there when this bond was given.

Mr. ROCHE.—You admit, if they were removed, they were removed prior to the first day of November, 1899.

(Testimony of Peter Malloch.)

Mr. CUSHING.—I just brought it out by the witness, and you moved to strike it out. I thought it was good testimony as it stood. We asked you to admit that they were in place, and you would not do it. You have just stricken out the testimony that they were removed in August. I can ask if they were not in place in the month of December, 1898.

Mr. ROCHE.—We made an admission yesterday, for the purpose of this trial, that all of these alleged fixtures were on the premises at the time the bond was given, and in connection with that statement Mr. Cushing stated and made an admission in the record that he intended to prove they were removed prior to the first day of November, 1899. Therefore, it is all immaterial.

Mr. CUSHING.—I did not understand counsel made that admission.

Mr. ROCHE.—Yes.

The COURT.—It is understood now you did make the admission that the property was on the premises on the 3d day of January, 1899.

Mr. ROCHE.—Yes.

Mr. CUSHING.—And affixed to the premises.

Mr. ROCHE.—They were on the premises.

Mr. CUSHING.—I want to show they were in place, affixed to the premises. Do you admit that?

Mr. ROCHE.—I cannot.

(Testimony of Peter Malloch.)

Mr. CUSHING.—Then I will ask Mr. Malloch about it, and take the ruling of the Court.

Mr. ROCHE.—Counsel offered to prove yesterday that these fixtures were affixed to the premises. Of course, for the purpose of the offer, you must assume that he could prove that fact. That being so, he had the full advantage of the entire offer.

Mr. CUSHING.—You do not want to admit that they were affixed when the bond was given, and I want to show it.

Mr. CUSHING.—Q. Do you know, Mr. Malloch, whether those articles that have been designated were on the premises known as the Crane-Buckley ranch after the 3d day of January, 1899, and in place thereon?

Mr. Roche objected to the question as incompetent, irrelevant and immaterial. And on the ground that it makes no difference whether they were affixed to the premises or not in view of the fact according to the admission made by counsel they were removed prior to the first of November, 1899.

Exception No. 13.

The COURT.—I sustain the objection. To which ruling counsel for plaintiff then and there duly excepted.

Q. (By Mr. CUSHING.) Do you know, Mr. Malloch, whether those articles that have been designated were on the premises known as the Crane-Buckley Ranch after the 3d day of January, 1899, and in place thereon? To which question defendants then and there objected on

(Testimony of Peter Malloch.)

the ground that it having been admitted that they were removed from the premises prior to the first day of November, 1899, that it was immaterial whether they were there prior to that date or how they were affixed.

Exception No. 14.

The Court sustained the objection, to which ruling counsel for plaintiff then and there duly excepted.

Mr. CUSHING.—We offer to prove by this witness now on the stand that the articles designated in the complaint were on that ranch and in place there, affixed to the premises, prior to and at the time the bond in suit was given.

Mr. ROCHE.—To that offer we interpose the same objection heretofore made to a similar offer while the witness Crane was on the stand.

Exception No. 15.

The COURT.—I sustain the objection. To which ruling the plaintiff then and there duly excepted.

Mr. CUSHING.—We also offer to prove as part of the same offer last hereinbefore made that Mr. Malloch knows about, and is competent to testify to the fact about which the offer has been made.

Mr. ROCHE.—That is assumed. To that offer we make the same objection.

Exception No. 16.

The Court sustained the objection to which ruling the counsel for plaintiff then and there duly excepted.

Counsel for plaintiff then and there while said witness was on the stand made the same offers to prove the amount of waste committed on said premises that were made while said witness, Henry A. Crane, was on the stand and which are hereinbefore set forth. To both of those offers counsel for defendant objected on the same grounds upon which he objected to the offers while said witness Crane was on the stand.

Exception No. 17.

The Court sustained the objections to which ruling and to both thereof, counsel for plaintiff then and there duly excepted.

Mr. CUSHING, counsel for plaintiff, thereupon produced a copy of the testimony of Mr. Con. O'Neill taken in open court on the former trial of the same case now pending and stated that he desired to read certain parts of said testimony pursuant to the stipulation that he had with counsel for defendants, that the same might be read without having the witness testify orally. It was thereupon stipulated by counsel, for all the parties that the testimony so produced of said witness, taken on the former trial might be read, subject to any other objections defendants might interpose but that no point would be made by defendants in objecting to said testimony on the ground that the witness was not personally present and that for the purpose of the trial the witness should be considered to be personally present.

Mr. Roche counsel for defendant thereupon stated that defendants, for the purpose of this trial made the same admissions as to the witness, Con. O'Neill, that they had

made as to the witness Malloch, to wit, that said Con. O'Neill was fully qualified to testify as to the value of the use and occupation of the premises during the periods referred to by counsel in his questions to the witnesses Crane and Malloch.

Mr. Cushing thereupon read from the said testimony the following question: "With your Honor's permission, I will ask Mr. O'Neill, from the knowledge you have of this land and the neighboring lands, and lands located even within the body of this land from the years 1890 down to 1898, and knowing the amount of alfalfa that was planted on this Crane ranch, and knowing of the amount of water that was there ready for irrigation, stock and the like, and these long ditches, and many of them, will you please state to the Court and jury how much would be in your opinion, and how much was, the value of the use and occupation of that entire Buckley ranch during the period between the first day of January, 1899, and the 4th day of November, 1899."

Mr. ROCHE.—To that question, in so far as it relates to the period of time between the 3d day of January, 1899, and the first day of November, 1899, we object, on the ground that the question is incompetent, irrelevant and immaterial; that the record of proof is already in evidence by which the plaintiff in this case is bound, to show that neither Dr. Buckley nor the sureties on his bond are responsible for the value of the use and occupation of the premises in question during that period of time.

The COURT.—I sustain the objection.

To said ruling plaintiff then and there duly excepted.

Exception No. 18.

Mr. CUSHING.—We make the same offer to prove by this witness O'Neill that we made by Mr. Crane, with reference to the value of the use and occupation between the 3d day of January, and the 1st day of November, 1899.

Mr. ROCHE.—To that offer we make the same objection.

The Court sustained the objection to which ruling plaintiff then and there duly excepted.

Exception No. 19.

Mr. CUSHING.—We offer to prove by this witness that all the machinery and appliances referred to in the complaint were affixed to the soil, and that they were in place on that ranch on and prior to January 3, 1899.

Mr. ROCHE.—We will object to that offer, in view of the admission made by counsel as irrelevant, incompetent and immaterial.

The Court sustained the objection to which ruling plaintiff then and there duly excepted.

Exception No. 20.

Mr. CUSHING.—We offer to prove by Mr. O'Neill, this witness, that those various articles designated in the complaint were affixed to the soil at that time and formed a part thereof.

Mr. ROCHE.—The same objection.

The COURT.—The same ruling.

To said ruling plaintiff then and there duly excepted.

Exception No. 21.

Mr. CUSHING.—We also offer to prove that they were then and there during the year 1899 of the value of $2,500.

Mr. ROCHE.—Same objection.

The COURT.—The objection is sustained.

To this said ruling plaintiff then and there duly excepted.

Exception No. 22.

It was thereupon admitted by counsel for defendants that the separator which was on the said Crane-Buckley Ranch during the year 1899 was of the kind known as an Alpha De Laval No. 1, and that it was purchased new during the year 1895, and that the engine that was on said premises during said year 1899 was a 14-horse-power stationary engine and that it was purchased new in the year 1895.

Mr. Cushing thereupon offered the following further testimony of said witness, Con. O'Neill, taken as said former trial.

Q. How was the boiler fastened?

Mr. ROCHE.—We make the same objection.

The COURT.—The same ruling.

To which plaintiff then and there duly excepted.

Exception No. 23.

Q. How was the brick placed or fastened?

Mr. ROCHE.—The same objection.

The COURT.—I sustain the objection.

To which plaintiff then and there duly excepted.

Exception No. 24.

Q. How was the engine fastened?

Mr. ROCHE.—The same objection.

The COURT.—The same ruling.

To which ruling plaintiff then and there duly excepted.

Exception No. 25.

Mr. CUSHING.—We offer to show by this witness that the articles referred to in the complaint were in place, or rather were all affixed to the premises and formed a part thereof at the time the bond in suit was given.

Mr. ROCHE.—We object to that as irrelevant, incompetent and immaterial.

The COURT.—I thought that had been admitted.

Mr. CUSHING.—No, they qualified their admission upon it.

Mr. ROCHE.—This particular one embraces the element that they were affixed on the premises. As I have already said, it is immaterial whether they were or not affixed, in view of the fact that counsel does not intend to prove that they were removed after the first day of November, 1899.

The Court sustained the objection, to which ruling plaintiff then and there duly excepted.

Exception No. 26.

Mr. CUSHING.—We also offer to prove that Mr. O'Neill, the witness, was qualified from actual knowl-

edge, having been in charge of the ranch, with the situation and state of affairs of all of these fixtures to testify as to their condition and value.

Mr. ROCHE.—The same objection.

The COURT.—The same ruling.

To which ruling plaintiff then and there duly excepted.

Exception No. 27.

Mr. Cushing thereupon produced the depositions of Daniel Zumwalt, duly taken pursuant to stipulation of all the parties to said action and on file therein. Counsel for defendant thereupon admitted that the said witness was fully competent and qualified to testify as to the value of the machinery referred to in the complaint, on the Crane-Buckley ranch during the year 1899.

The COURT (to Mr. CUSHING.)—Is there any necessity of introducing further testimony?

Mr. CUSHING.—I think I have covered the ground with the exception of one or two more witnesses.

The COURT.—It seems to me that you have covered the ground that gives you the advantage of all the questions.

Mr. CUSHING.—Then I will make an offer as to this testimony. We offer to prove by this witness and also by another witness, Mr. Louis M. Howell, whose competency I believe will also be admitted.

Mr. ROCHE.—Yes.

Mr. CUSHING (Continuing).—That the value of the articles set forth in the complaint and claimed to be

(Testimony of Theodore J. Roche.)

fixtures at the time that they were removed from the premises in the year 1899, was the sum of $2,500.

Mr. ROCHE.—To that we make the same objection.

The COURT.—The objection is sustained.

To which ruling plaintiff then and there duly excepted.

Exception No. 28.

Mr. CUSHING.—We make that offer by each of said witnesses, Zumwalt and Howell. There will be the same ruling, I suppose?

The COURT.—Yes.

To this ruling plaintiff then and there duly excepted.

Exception No. 29.

Plaintiff here rested his case. Thereupon Mr. ROCHE made an opening statement to the jury as to what the defendant proposed to prove, and was thereupon duly sworn as a witness on behalf of defendants and testified as follows, to wit:

My name is Theodore J. Roche. I am 28 years of age and an attorney at law, practicing in this city. I was one of the attorneys for Dr. C. F. Buckley in the case of Crane vs. Buckley, the action to foreclose which has been repeatedly referred to in this case. In that case the plaintiff was represented by Messrs. Mullany, Grant & Cushing and Sheldon Borden. In the latter part of October, 1899, I went to the office of Mr. Mullany of the firm of Mullany, Grant & Cushing, and had a conversation with him in reference to giving up possession

(Testimony of Theodore J. Roche.)

of the premises described in the complaint. I approached him as one of the attorneys for Dr. Buckley pursuant to a conversation I had with Dr. Buckley concerning the property in dispute. This was sometime prior to the first of November, 1899. It must have been a very short time prior to that date. I do not remember the exact words which passed between Mr. Mullany and myself. I know that in that conversation I told Mr. Mullany that Dr. Buckley did not intend to pay to Mr. Crane the amount found due by the lower Court, as the amount which he should pay in order to obtain title to that property. I also told him that Dr. Buckley would remove from that ranch before or on the first day of November, 1899, and was ready to deliver up possession of the property to Mr. Crane. If my recollection serves me correctly Mr. Mullany and Mr. Crane both contemplated going down there together. Mr. Mullany said it was not convenient for either himself or Mr. Crane to go down until the 4th day of November and wanted to know if we would not deliver possession at that time. I then said that we had no objection to that if they would not take advantage of the fact that Mr. Buckley remained in possession until after the first day of November, and that was agreed, my recollection is that Mr. Crane was present at the time. I then left the office of Mr. Mullany. If my recollection serves me correctly Mr. Mullany desired to have some paper on record showing that Dr. Buckley had complied with the terms of this decree, and that he had delivered up the

(Testimony of Theodore J. Roche.)

possession of the property to Mr. Crane, and the paper offered in evidence (witness refers to Plaintiff's Exhibit "E") was drawn up in Mr. Mullany's office. I had nothing to do with the drawing of the paper. It must have been handed to me by Mr. Mullany or some person in his office because I have signed all of the names of the attorneys to it. They all appear in my handwriting.

Cross-examination.

I was attorney for Dr. Buckley and drew up the answer on file in this case. I know that Mr. Mullany, the party I claim to have met at that time, is dead.

ALBERT WESTINGTON was thereupon sworn as a witness on behalf of defendants, and testified: I reside in San Jose, California. I am a telegrapher for the Southern Pacific Company at San Jose and had been since 1900. I am familiar with the premises known as the Crane-Buckley tract of land having resided there for eighteen months prior to November 1st, 1899. I did not reside there continually during that time but resided there off and on. During the month of October, 1899, I was present on that ranch. There was a hired man also there at the time. Off and on we had extra help at times. I was employed by Cornelius F. Buckley, one of the defendants in this case, and was in charge of that ranch during October, 1899. I left the ranch on the afternoon, before dark, of the last day of October, 1899. At the time I left the ranch there was no stock or prop-

(Testimony of Albert Westington.)

erty of any kind belonging to Dr. Buckley remaining on the land and there was no person or persons employed by Dr. Buckley left on the land at the time I left. (Witness was here shown a letter purporting to be written by Dr. Buckley and stated that the latter was in the handwriting of Dr. Buckley and that the witness received the same through the United States mail.) I left the ranch under instructions received from my employer, Dr. Buckley. After I left the ranch I did not enter it again but went to Goshen and remained there two days. During that time no one representing Dr. Buckley, as far as I am aware, went on that ranch.

CORNELIUS F. BUCKLEY was thereupon duly sworn as a witness and testified as follows: I reside in San Francisco, and am engaged in practicing medicine, and have been for 35 years. I am one of the defendants in this action and was the defendant in the original case of Henry A. Crane vs. myself, involving this tract of land situate near Goshen, California. The law firm of Sullivan & Sullivan including Mr. Roche, instructed me that it was desirable to give up the land by the first of the month or before the first and accordingly I wrote to my man down there to give it up. I had a conversation with Mr. Roche about this matter prior to November 1st, 1899. I had a conversation with Mr. Roche about going to the office of Mr. Mullany in connection with the delivering up of the premises. The letter now shown to me dated October 30, 1899 (being same letter heretofore referred to by the witness Westington), is in

(Testimony of Cornelius F. Buckley.)

my handwriting. It was sent pursuant to the consultation I had with Mr. Roche. I sent it to Albert Westington at the ranch. I addressed it to him at Goshen. (The letter was thereupon offered in evidence by counsel for defendant. Counsel for plaintiff objected to the admission of the letter in evidence on the ground that it was not brought to the attention of the plaintiff and was intended to contradict the document signed by the witness that was delivered to Mr. Crane, and that it was incompetent for that purpose.)

The COURT.—I will admit the letter and overrule the objection. I do it on the ground that Dr. Buckley may state what occurred—what he did. I state that to meet the objection made by counsel for the plaintiff.

To this ruling plaintiff then and there duly excepted.

Exception No. 30.

The letter was thereupon received and read in evidence and was and is in words and figures following, to wit:

Dr. C. F. Buckley,

813 O'Farrell Street.

San Francisco, Cal., Oct. 30th, 1899.

Dear Albert: You are to get all things off the ranch by to-morrow night. Ship horses here to Joyce. I'll look them over and see which I shall keep and which dispose of. They lost one of the dogs on the way up. Try and see about it.

Yours,

C. F. B."

(Testimony of Cornelius F. Buckley.)

(The witness continuing): I never went on that ranch after the first day of November, 1899, and never directed any other person to go on the same or to remain in possession of it.

The case for the defendant was here closed. Counsel for plaintiff, by permission of Court, read to the jury Plaintiff's Exhibit "E," hereinbefore set forth. The foregoing was all the testimony offered or adduced at said trial.

The testimony was thereupon closed.

INSTRUCTIONS REQUESTED BY PLAINTIFF AND REFUSED BY THE COURT.

Thereupon counsel for plaintiff requested the Court to give the jury the following instructions:

I.

This is an action by plaintiff, Henry A. Crane, to recover from defendants, C. F. Buckley, Rudolph Spreckels and Timothy Hopkins, the sum of $8,000.00, claimed by plaintiff to be due and owing to him under a certain bond, entered into and given by the defendants, C. F. Buckley, as principal, and Rudolph Spreckels and Timothy Hopkins, as sureties. The defendants admit the giving and execution of this bond by them; and the facts and proceedings leading up to, and for the giving and execution of, the bond are:

That on November 16, 1898, a judgment was given and made in the United States Circuit Court, Ninth Judicial Circuit, in and for the Southern District of California,

in an action wherein Henry A. Crane, the plaintiff herein, was the plaintiff, and Cornelius F. Buckley, one of the defendants herein, was the defendant, and which judgment was in favor of said Henry A. Crane and against said Cornelius F. Buckley, and whereby said Henry A. Crane was adjudged to be the owner in fee of certain real property, comprising 5,982 acres of land, more or less, and certain water ditches, water rights, and rights of way therein described, and located in Tulare County, in this State, and rights and interests of Cornelius F. Buckley as a purchaser in possession of the property was foreclosed and terminated, with the privilege of redeeming from the foreclosure on or before January 1, 1899, and of remaining in possession, use and occupation for that purpose until that time, upon payment of $60,000, and interest thereon at the rate of nine per centum (9%) from March 18, 1894, until such payment, and all taxes and assessments levied upon or against said property and all expenses of keeping up and maintaining water headgates which shall be paid by Henry A. Crane, with interest thereon at the same rate; and in case he, Cornelius F. Buckley, should fail to make said payments on or before January 1, 1899, that he be removed from, and turned out of the possession, use and occupation of said real property, water ditches, water rights, and rights of way, and that Henry A. Crane be restored to and placed in the possession, use and occupation thereof, and that Cornelius F. Buckley's claims and interest in and to said real property be then forever terminated and ended.

II.

That defendant, Cornelius F. Buckley, did not avail himself of the privilege awarded him in and by said judgment, of paying the sums of money designated therein, or any part of said sums, for said property, on or before January 1, 1899, or since said time or at all; but on or about December 16, 1898, he moved for and obtained an order of said Circuit Court of the United States, whereby he was allowed an appeal from said judgment to the United States Circuit Court of Appeals in and for the Ninth Circuit, and whereby the amount of the bond to be given to operate as a supersedeas and for costs upon said appeal was fixed at the sum of $8,000, and thereafter he prosecuted his appeal; and pursuant to said order, he, Cornelius F. Buckley, as principal and defendants, Rudolph Spreckels and Timothy Hopkins, as sureties, entered into, gave and executed the bond for that sum, and which bond did serve and operate as a supersedeas, that is to stay execution of any proceedings under said judgment, and for costs, upon and pending said appeal. And said bond was duly approved, and was filed on the 3d day of January, 1899, and which is the bond sued upon in this action.

III.

That defendant, Cornelius F. Buckley, was then, when said bond was entered into, given and filed, in the exclusive possession, use and occupation of all of said real property, water ditches, water rights and rights of way, described in the judgment so appealed from, and he continued thereafter until the 4th day of November, 1899,

in the exclusive possession, use and occupation of all of said property.

IV.

The privilege awarded to defendant, Cornelius F. Buckley, by the United States Circuit Court of Appeals in and for the Ninth Circuit, in its opinion and judgment, in passing upon and denying his petition for a rehearing of his appeal to that Court, whereby it allowed him until the 1st day of November, 1899, to make the payments provided for in and by the judgment, constitutes no defense to this action, because he did not avail himself of that privilege, and he did not pay or attempt to pay any part of the moneys for the payment of which he asked and was allowed the extended time mentioned.

The defendant, Cornelius F. Buckley, failed to make good his said appeal, and failed to prosecute his appeal to effect, in the case of Henry A. Crane against him, so appealed by him to the United States Circuit Court of Appeals in and for the Ninth Circuit, on which appeal the bond sued upon in this action was given and executed by the defendant herein; and under the provisions of that bond, the plaintiff is entitled to a verdict at your hands against the defendants in this action, for the value of the use and occupation of the real property described in the judgment which was so appealed from, from the 3d day of January, 1899, to the 4th day of November, 1899, not to exceed the sum of $5,500.

V.

In addition to the value of the use and occupation of the real property described in the judgment appealed

from, plaintiff claims and seeks to recover compensation in the sum of $2,500 for waste claimed to be committed upon that real property, between the 3d day of January and the 4th day of November, 1899; and which waste is claimed to have consisted in severing and removing from said real property, a steam boiler, engines, machinery and appurtenances which it is claimed were, when so severed, built in brickwork, and affixed to said real property, and formed part thereof, and used for operating a creamery thereon; and also, in severing and removing from said real property three water pumps, with a windmill and tower claimed to be affixed to each for working the same, and two other water pumps with a horse-power machine claimed to be affixed to each for working the same, and also two other water pumps, and all of which are claimed to have been affixed to said real property and formed part thereof.

VI.

Real or immovable property consists of land, and that which is affixed to land; and that which is incident or appurtenant to land. A thing is deemed to be affixed to land, when permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.

If you find from the evidence that the steam boiler, engines, machinery and appurtenances for creamery use, and the three water pumps with a windmill and tower attached to each, and two other water pumps with horse-power machine attached to each, and two other water

pumps, or any of them, were affixed to the land described in the complaint herein, or permanently resting upon said land, or premanently attached to what was permanently resting on or attached to said land, and that between the 3d day of January, 1899, and the 4th day of November, 1899, defendant, Cornelius F. Buckley, caused or permitted either one or more of said articles, or of the appurtenances thereto, to be severed and removed from said land, you will then consider the evidence as to the value of such article or articles so severed and removed and include such value in and as part of your verdict for and in favor of plaintiff and against the defendants herein, not exceeding the sum claimed by plaintiff for waste, to wit, the sum of twenty-five hundred (2,500) dollars."

The Court refused to give said instructions, or any of them, to said jury. The plaintiff then and there duly excepted, and now excepts, to the refusal of said Court to give said jury the said instructions or requests to charge, and to its refusal to give each and every paragraph and subdivision of paragraph thereof.

Exceptions No. 31.

Thereupon the Court charged the jury as follows:

CHARGE TO THE JURY.

The COURT.—(Orally.) Gentlemen of the Jury: This action is on a bond of the defendants, wherein the defendant, C. F. Buckley, is principal, and the defendants, Rudolph Spreckels and Timothy Hopkins, are sureties.

The bond was given in the Circuit Court of the United States for the Southern District of California, in the sum

of $8,000, to indemnify Henry A. Crane, his attorneys, executors, administrators, etc., upon a stay of execution on a judgment in his favor in that court.

The condition of the bond was that if the defendant, C. F. Buckley, should prosecute an appeal to the Circuit Court of Appeals in the case in which this bond was given, and should answer all damages and costs that had been and should be awarded against the defendants, Buckley, if he failed to make good the appeal, and he should answer all damages that should accrue to the respondent, Crane, by reason of the value of the use and occupation of the land and premises from the time of appeal until delivery of possession thereof to Crane, and from all waste committed thereon, the obligation of the bond was to be void; otherwise, to remain in full force and effect.

The parties prosecuted an appeal to the Circuit Court of Appeals, and that court extended the occupation of the premises by Buckley, under the contract which was in suit, to the first day of November, 1899—extended it from the first day of January, 1899, until the first day of November, 1899.

Under the law of this case, the plaintiff is not entitled to recover, either for use or occupation, or for waste, prior to the first day of November, 1899, under the terms of the modified decree.

That leaves the only questions for you to determine, first, as to whether or not Buckley vacated those premises on or before the first day of November, 1899, and, if he did not, then the value of the use and occupation for

the remainder of the time, from the first day of November until the fourth day of November.

To state the question again, gentlemen, so that you may understand distinctly the issues upon which you are to pass: If you believe from this evidence that Dr. Buckley vacated these premises on or before the first day of November, 1899, and turned over the property to Mr. Crane, then your verdict should be for the defendant. But if, on the other hand, you should believe from the evidence that Dr. Buckley did not turn over these premises to Mr. Crane at that time, but on some other day betwee that time and the fourth day of November, then it will be your duty to determine the value of the use and occupation of those premises for that time; that is to say, for the days that Dr. Buckley retained possession of the premises during the month of November, and between the first day of November and the fourth day of November.

You have heard the testimony of the witnesses in this case. It is a question of fact for you to determine whether or not Dr. Buckley did turn over these premises to the plaintiff, as he claims, prior to the first day of November, 1899.

You have heard the testimony as to the value of the premises. In case you determine he did not turn over the premises, as he claims, but retained possession of them after the first of November, then it will be for you to determine the value of the use and occupation.

You have heard the testimony upon that question. Mr. Crane testified that the premises were worth $5,500 per annum, and that a proportionate value of the premises

for three days would be the sum of $100. That is a matter of calculation, which you can determine for yourselves.

There is also testimony tending to show that afterward these premises were rented to Miller & Lux for $1.500 per annum, and that there were some other conditions in that lease which affected, possibly, the value of the use and occupation of the premises. It will be for you to consider that. I will give this instruction, gentlemen, requested by the defendants: If you believe from the evidence that prior to the first day of November, 1899, the above-named defendant, Cornelius F. Buckley, tendered and offered to the above-named plaintiff, Henry A. Crane, the possession of all the real property, water ditches, water rights and rights of way, described and referred to in plaintiff's complaint, and that thereafter and on the 31st day of October, A. D. 1899, the said defendant, Cornelius F. Buckley, gave up and went out of the possession of all of said premises, and never again entered into the possession thereof, then I instruct you that your verdict must be against the plaintiff and in favor of the defendants.

I shall submit to you two forms of verdict, in one of which you find in favor of the defendants, and the other in which you find in favor of the plaintiff, and assess the damages at whatever sum you agree upon, in case you find for plaintiff. When you retire to your room, you will agree upon a foreman, and when you agree upon a verdict you will authorize the foreman to sign it. It requires a unanimous verdict.

To the giving of the foregoing charge and instructions, and to the giving of each and every part and paragraph thereof, plaintiff then and there duly excepted and now excepts.

Plaintiff then and there duly excepted and now excepts to that portion of the charge given by the Court wherein the Court charged that plaintiff was not entitled to recover for either the use and occupation or for waste, prior to November 1, 1899.

Exception No. 32.

The jury thereupon retired and deliberated upon a verdict, and subsequently returned into court and rendered their verdict in favor of defendants and against said plaintiff.

That thereafter and on the 17th day of August, 1904, judgment was entered upon said verdict, which said judgment was and is in words and figures following, to wit:

["Title of Court and Cause.]

Judgment.

This cause having come on regularly for trial upon the 16th day of August, 1904, being a day in the July, 1904, term of said Circuit Court, before the Court and a jury of twelve men duly impaneled and sworn. Charles and Oscar K. Cushing, Esqs., appearing at attorneys for plaintiff, and Theodore J. Roche and D. M. Delmas, Esqs., appearing as attorneys for the defendants and the trial having been proceeded with upon the 17th day of August, 1904, and evidence oral and documentary upon behalf of the respective parties, having been introduced, and the

evidence having been closed and the cause, after the instruction of the Court, having been submitted to the jury, and the jury, after due deliberation, having rendered the following verdict, which was ordered recorded, viz.:

We, the jury, find in favor of the defendants.

(Signed) JENKS F. NESMITH, Foreman."

—and the Court having ordered that judgment be entered herein, in accordance with said verdict and for costs:

Now, therefore, by virtue of the law, and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action; that defendants go hereof without day, and that defendants recover from plaintiff their costs in this behalf expended, taxed at $1.00.

Judgment entered Aug. 17, 1904.

SOUTHARD HOFFMAN,
Clerk.

A true copy—attest.

[Seal] SOUTHARD HOFFMAN,
Clerk.

By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: Filed August 17, 1904. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

SPECIFICATIONS OF PARTICULARS WHEREIN THE EVIDENCE WAS AND IS INSUFFICIENT TO JUSTIFY THE VERDICT.

1. The evidence was and is insufficient to justify the verdict in this: That there was and is no evidence show-

ing, or tending to show, and the evidence fails to show, that defendant, C. F. Buckley, prosecuted his appeal to effect from the judgment and decree made and entered against him in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, in that certain action wherein said Henry A. Crane was plaintiff and said C. F. Buckley was defendant and cross-complainant referred to in plaintiff's complaint.

2. The evidence was and is insufficient to justify the verdict in this: That there was and is no evidence showing, or tending to show, and the evidence fails to show, that said defendant, C. F. Buckley, made good his appeal from the judgment and decree made and entered against him in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, in that certain action wherein said Henry A. Crane was plaintiff and said C. F. Buckley was defendant and cross-complainant referred to in plaintiff's complaint.

3. The evidence was and is insufficient to justify the verdict in this: That there was and is no evidence showing, or tending to show, and the evidence fails to show, that C. F. Buckley prosecuted his appeal to effect, but on the contrary the evidence conclusively establishes the fact that the judgment, in the action wherein said C. F. Buckley was defendant and Henry A. Crane was plaintiff in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, referred to in the complaint herein, was affirmed.

4. The evidence was and is insufficient to justify the verdict in this: That there was and is no evidence show-

ing, or tending to show, and the evidence fails to show, that said Cornelius F. Buckley remained in possession of the premises described in Exhibit "A" to plaintiff's complaint under and by virtue of the judgment rendered, in that certain action, referred to in the complaint, wherein said Henry A. Crane was plaintiff and said C. F. Buckley was defendant, in the Circuit Court of Appeals, upon an appeal of said defendant, C. F. Buckley, from said judgment made and entered against him in said Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, but on the contrary it conclusively appears that he remained in possession of said premises by virtue of the supersedeas bond referred to and set forth in complaint herein.

5. The evidence was and is insufficient to justify the verdict in this: That there was and is no evidence showing, or tending to show, and the evidence fails to show, that said defendants were entitled to a verdict against plaintiffs for their costs herein, or at all, and that plaintiff was not entitled to any relief in said action.

SPECIFICATIONS WHEREIN THE VERDICT IS AGAINST LAW.

Said verdict was and is against law in each and every one of the particulars from one (1) to five (5), inclusive, wherein it is specified that the evidence was and is insufficient to justify the verdict, to which specifications reference is hereby made as though each of said particulars was specifically set forth and incorporated herein.

ASSIGNMENT OF ERRORS IN LAW OCCURRING AT THE TRIAL.

1. The Court erred in overruling plaintiff's objection to the application of defendants to file said amendment to their answer herein.

2. The Court erred in overruling plaintiff's objection to the introduction in evidence "of the decree modifying former decree," being Defendants' Exhibit No. 1, thereinbefore set forth.

3. The Court erred in overruling defendants' objection to the question addressed to plaintiff, Henry A. Crane, as follows: "State, Mr. Crane, what was the value of the use and occupancy of that land from the 3d day of January, 1899, to the 4th day of November, 1899."

4. The Court erred in sustaining defendants' objection to the question addressed to said witness, Henry A. Crane, as follows: "What was the value, from your knowledge of the use and occupancy of that land from the 3d day of January, 1899, to the first day of November, 1899?"

5. The Court erred in sustaining defendants' objection to the offer made by plaintiff to prove by said witness, Henry A. Crane, "that the value of the use and occupation of the real property described in the judgment and decree, copy of which is annexed to and made a part of the complaint on file herein and marked Exhibit "A," from the 3d day of January, 1899, to the 4th day of November, 1899, was and is the sum of over $5,500."

6. The Court erred in sustaining defendants' objection to the offer made by plaintiff while said Henry A. Crane was on the witness-stand, in words as follows: "Mr. Cushing.—We offer to prove by the witness, Henry A. Crane, that defendant, C. F. Buckley, caused and committed waste upon and of said real property described in said judgment and decree, a copy of which is annexed to and made a part of the complaint on file herein, and marked Exhibit "A," between the 3d day of January, A. D., 1899, and the first day of November, A. D. 1899, to the extent of and in the amount of over $2,500."

7. The Court erred in sustaining defendants' objection to the offer made while said plaintiff, Henry A. Crane, was on the witness-stand as follows: "That said waste consisted in tearing up, severing and removing from said real property a steam boiler, engines, machinery and appurtenances which were, up to the time of the tearing up, severing and removal thereof, built in brickwork and affixed to said real property, and formed a part thereof, and were built, placed and constructed for use, and were used, in and for the purpose of carrying on and operating a creamery thereon; and also in tearing up, severing and removing from said real property three water pumps, with wind-mill and tower affixed to each for working the same, and also two other water pumps with a horse-power machine affixed to each for working the same, and also two other water pumps, all of which were built, placed and constructed for use, and were used for pumping water from

water wells, and all of which were set in and affixed to said real property, and formed a part thereof."

8. The Court erred in granting defendants' motion to strike out the answer of the witness, Malloch, as follows: "I would say about $3,500," and also in sustaining defendants' objection to the question asked said witness as follows: "Mr. Malloch, what was the value of the use and occupation of that ranch known as the Crane-Buckley tract from the 3d day of January, 1899, to the 4th day of November, 1899?"

9. The Court erred in sustaining defendants' objection to the offer made while the witness, Malloch, was on the witness-stand, wherein the plaintiff offered to prove "that the value of the use and occupation of the real property described in the judgment and decree, a copy of which is annexed to and made a part of the complaint on file herein and marked Exhibit "A," from the 3d day of January, 1899, to the 4th day of November, 1899, was and is the sum of over $5,500."

10. The Court erred in sustaining defendants' objection to the question addressed to said witness, Malloch, as follows:

"Q. (By Mr. CUSHING.) Mr. Malloch, do you know the condition of that ranch with respect to the value of its use and occupation during the years of 1898-1897?"

11. The Court erred in granting the motion of defendants to strike out the answer of the witness, Malloch, as follows: "A. They were removed in August, 1899."

12. The Court erred in sustaining the objection of defendants to the question asked of the witness, Malloch, as follows: "Do you know, Mr. Malloch, whether those articles that have been designated were on the premises known as the Crane-Buckley ranch after the 3d day of January, 1899, and in place thereon?"

13. The Court erred in sustaining the objection of defendants to the question asked of the witness, Malloch, as follows: Q. (By Mr. Cushing.) "Do you know, Mr. Malloch, whether those articles that have been designated were on the premises known as the Crane-Buckley ranch after the 3d day of January, 1899, and in place thereon?"

14. The Court erred in sustaining defendants' objections to the offer of plaintiff while the witness, Malloch, was on the stand, contained in the following words: "Mr. Cushing.—We offer to prove by this witness now on the stand that the articles designated in the complaint were on that ranch and in place there affixed to the premises, prior to and at the time the bond in suit was given."

15. The Court erred in sustaining defendants' objection to the offer made by plaintiff to prove that the witness, Malloch, was competent to testify as to the manner in which the various articles designated in the complaint were affixed to said premises.

16. The Court erred in sustaining objection of defendants to the offer of the plaintiff, while the witness, Malloch, was on the stand, to prove the amount of waste

committed on the premises between the third day of January and the 4th day of November, 1899.

17. The Court erred in sustaining defendants' objection to the question addressed to said witness, Con. O'Neill, in words as follows: "With your Honor's permission, I will ask, Mr. O'Neill, from the knowledge you have of this land and the neighboring lands, and lands located even within the body of this land from the years 1890 down to 1898, and knowing the amount of alfalfa that was planted on this Crane ranch, and knowing of the amount of water that was there ready for irrigation, stock and the like, and these long ditches, and many of them, will you please state to the Court and jury how much would be in your opinion, and how much was, the value of the use and occupation of that entire Buckley ranch during the period between the first day of January, 1899, and the 4th day of November, 1899?"

18. The Court erred in sustaining defendants' objection made while the witness, Con. O'Neill, was on the stand to plaintiff's offer to prove the value of the use and occupation of said premises between the 3d day of January and the first day of November, 1899.

19. The Court erred in sustaining defendants' objection to the offer made to prove by the witness, Con. O'Neill, which offer was in words as follows: "Mr. Cushing.—We offer to prove by this witness that all of the machinery and appliances referred to in the complaint were affixed to the soil, and that they were in place on that ranch on and prior to January 3d, 1899."

20. The Court erred in sustaining defendants' objection to the offer made to prove by the witness, O'Neill, which offer was in words as follows: "Mr. Cushing.—We offer to prove by Mr. O'Neill, this witness, that those various articles designated in the complaint were affixed to the soil at that time and formed a part thereof."

21. The Court erred in sustaining defendants' objection to the offer made to prove by the witness, Con. O'Neill, in words as follows: "Mr. Cushing.—We also offer to prove that they were then and there during the year 1899 of the value of $2,500."

22. The Court erred in sustaining defendants' objection to the question asked the witness, O'Neill, as follows: "Q. How was the boiler fastened?"

23. The Court erred in sustaining defendants' objection to the question: "How was the brick placed or fastened?"

24. The Court erred in sustaining defendants' objection to the question asked said witness, O'Neill: "Q. How was the engine fastened?"

25. The Court erred in sustaining defendants' objection to the offer made to prove by the witness, O'Neill, which offer was made in words as follows: "Mr. Cushing.—We offer to prove by this witness that the articles referred to in the complaint, were in place, or rather were all affixed to the premises and formed a part thereof at the time the bond in suit was given."

26. The Court erred in sustaining defendants' objection to the offer made to prove by the testimony of the witness, O'Neill, which offer was in words as follows:

"Mr. Cushing.—We also offer to prove that Mr. O'Neill, the witness, was qualified from actual knowledge, having been in charge of that ranch, that the situation and state of affairs of all those fixtures to testify as to their condition and value."

27. The Court erred in sustaining defendants' objection to the offer to prove by the witnesses, Daniel Zumwalt and Louis M. Howell, that the value of the articles set forth in the complaint and claimed to be fixtures at the time that they were removed from the premises in the year 1899, was the sum of $2,500."

28. The Court erred in refusing to give to the jury the following instructions at the request of plaintiff: "The privilege awarded to defendant, Cornelius F. Buckley, by the United States Circuit Court of Appeals in and for the Ninth Circuit, in its opinion and judgment, in passing upon and denying his petition for a rehearing of his appeal to that Court, whereby it allowed him until the 1st day of November, 1899, to make the payments provided for in and by the judgment, constitutes no defense to this action, because he did not avail himself of that privilege, and he did not pay or attempt to pay any part of the moneys for the payment of which he asked and was allowed the extended time mentioned."

29. The Court erred in refusing to give to the jury the following instructions at the request of the plaintiff: "The defendant, C. F. Buckley, failed to make good his appeal and failed to prosecute his appeal to effect in the case of Henry A. Crane against him so appealed by him to the United States Circuit Court of Appeals in and for

the Ninth Circuit, on which appeal the bond sued upon in this action was given and executed by the defendants herein."

30. The Court erred in refusing to give to the jury the following instructions at the request of the plaintiff: "Real or immovable property consists of land, and that which is affixed to land; and that which is incident or appurtenant to land. A thing is deemed to be affixed to land, when permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.

If you find from the evidence that the steam boiler, engines, machinery and appurtenances for creamery use, and the three water pumps with a windmill and tower attached to each, and two other water pumps with horse power machine attached to each, and two other water pumps, or any of them, were affixed to the land described in the complaint herein, or permanently resting upon said land, or permanently attached to what was permanently resting on or attached to said land, and that between the 3d day of January, 1899, and the 4th day of November, 1899, defendant, Cornelius F. Buckley, caused or permitted either one or more of said articles or of the appurtenances thereto, to be severed and removed from said land, you will then consider the evidence as to the value of such article or articles so severed and removed and include such value in and as part of your verdict for and in favor of plaintiff and against the defendants herein, not exceeding the sum

claimed by plaintiff for waste, to wit, the sum of twenty-five hundred (2500) dollars."

31. The Court erred in giving to the jury the charge hereinabove set forth and in giving to said jury each and every part, instruction and paragraph of said charge as hereinabove set forth.

32. The Court erred in instructing the jury as follows: "Under the law of this case the plaintiff is not entitled to recover either for use and occupation or for waste prior to the first day of November, 1899, under the terms of the modified decree."

33. The Court erred in giving to the jury the following instructions: "That leaves the only questions for you to determine, first, as to whether or not Buckley vacated those premises on or before the first day of November, 1899, and if he did not, then the value of the use and occupation for the remainder of the time from the first day of November until the 4th day of November."

Plaintiff, in order that the foregoing matters may be and remain of record, hereby proposes the foregoing as his bill of exceptions herein, and asks that the same may be settled and allowed as presented.

Dated San Francisco, Cal., September 13th, A. D. 1904.

MULLANY, GRANT & CUSHING,

Attorneys for Plaintiff.

The foregoing bill of exceptions was proposed and served in due time, and is full, true and correct, and may be settled and allowed as presented.

Dated San Francisco this 30 day of Sept., A. D. 1904.

THEODORE J. ROCHE,
SULLIVAN & SULLIVAN,
Attorneys for Defendants.

D. M. DELMAS,
Of Counsel.

The foregoing bill of exceptions was presented in due time, and is full and correct, and is a true bill of exceptions, and the same is hereby settled and allowed.

Dated this 1st day of October, A. D. 1904.

WM. W. MORROW,
Judge.

[Endorsed]: Receipt of the within bill of exceptions by copy is hereby admitted this 13th day of September, 1904.

D. M. DELMAS,
THEO. J. ROCHE,
SULLIVAN & SULLIVAN,
Attorneys for Defendants.

Filed October 1st. 1904. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

HENRY A. CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants.
No. 12.884.

Petition for Writ of Error.

To the Honorable, the Judges of the Said United States Circuit Court, in and for the Ninth Judicial Circuit, Northern District of California—Honorable W. W. MORROW, Presiding Judge.

The plaintiff, Henry A. Crane, plaintiff in error herein, respectfully represents that he is the plaintiff and plaintiff in error, in the proceedings and action hereinafter mentioned, and that Cornelius F. Buckley, Timothy Hopkins and Rudolph Spreckels, are the defendants and defendants in error in the above-entitled action and proceeding. That said plaintiff in the above-entitled action, Henry A. Crane, plaintiff in error therein, feeling aggrieved by the verdict of the jury rendered herein and the judgment en-

tered thereon on the 17th day of August, 1904, comes now by Messrs. Cushing, Grant & Cushing, his attorneys, and petitions said Court for an order allowing said plaintiff to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of the security, which the said plaintiff shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error, by the said United States Court of Appeals for the Ninth Circuit.

Your petitioner further shows that the said firm of attorneys by whom he appears in this petition is composed of Messrs. William Grant, O. K. Cushing and Charles S. Cushing, and that said attorneys are the sole surviving members of the former firm of Mullany, Grant & Cushing, which firm was at all times prior to the death of Michael Mullany, which occurred on August 11th, 1903, the attorneys and counsel for plaintiff herein.

And your said petitioner and plaintiff will ever pray.

CUSHING, GRANT & CUSHING.

Attorneys for Said Plaintiff.

[Endorsed]: Filed October 14, 1904. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

HENRY A. CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY et al.,
Defendants.
No. 12,884.

Assignment of Errors.

The plaintiff, Henry A. Crane, having petitioned said Court for an order permitting him to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment made and entered in said cause, now makes and files with said petition the following, and specifies the same as his assignment of errors herein and upon which he will rely for the reversal of said judgment upon said writ:

I.

SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE.

1. The evidence was and is insufficient to justify the verdict in this: That there was and is no evidence showing, or tending to show, and the evidence fails to show, that defendant, C. F. Buckley, prosecuted his appeal to effect from the judgment and decree made and entered against him in the Circuit Court of the United States,

Ninth Judicial Circuit, in and for the Southern District of California, in that certain action wherein said Henry A. Crane was plaintiff and said C. F. Buckley was defendant and cross-complainant referred to in plaintiff's complaint.

2. The evidence was and is insufficient to justify the verdict in this: That there was and is no evidence showing, or tending to show, and the evidence fails to show, that said defendant, C. F. Buckley, made good his appeal from the judgment and decree made and entered against him in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, in that certain action wherein said Henry A. Crane was plaintiff and said C. F. Buckley was defendant and cross-complainant referred to in plaintiff's complaint.

3. The evidence was and is insufficient to justify the verdict in this: That there was and is no evidence showing, or tending to show, and the evidence fails to show, that C. F. Buckley prosecuted his appeal to effect, but on the contrary, the evidence conclusively establishes the fact that the judgment, in the action where said C. F. Buckley was defendant and Henry A. Crane was plaintiff in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, referred to in the complaint herein, was affirmed.

4. The evidence was and is insufficient to justify the verdict in this: That there was and is no evidence showing, or tending to show, and the evidence fails to show, that said Cornelius F Buckley remained in possession of the premises described in Exhibit "A" to plaintiff's com-

plaint, under and by virtue of the judgment rendered, in that certain action, referred to in the complaint, wherein said Henry A. Crane was plaintiff and said C. F. Buckley was defendant, in the Circuit Court of Appeals upon an appeal of said defendant, C. F. Buckley, from said judgment made and entered against him in said Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, but, on the contrary, it conclusively appears that he remained in possession of said premises by virtue of the supersedeas bond referred to and set forth in complaint herein.

5. The evidence was and is insufficient to justify the verdict in this: That there was and is no evidence showing, or tending to show, and the evidence fails to show, that said defendants were entitled to a verdict against plaintiff for their costs herein, or at all, and that plaintiff was not entitled to any relief in said action.

II.

SPECIFICATIONS WHEREIN THE VERDICT IS AGAINST LAW.

Said verdict was and is against law in each and every one of the particulars from one (1) to five (5), inclusive, wherein it is specified that the evidence was and is insufficient to justify said verdict, which are hereinbefore set forth, to which specifications reference is hereby made as though of each of said particulars was specifically set forth and incorporated herein.

III.

ERRORS IN LAW OCCURRING AT THE TRIAL.

1. The Court erred in overruling plaintiff's objection to the application of defendants to file said amendment to their answer herein.

2. The Court erred in overruling plaintiff's objection to the introduction in evidence "of the decree modifying former decree," being Defendants' Exhibit No. 1 set forth in plaintiff's bill of exceptions, the full substance of which modifying decree was and is, that thereby, the former decree made and entered (in said Circuit Court of the United States, in and for the Southern District of California, in that certain action brought by Henry A. Crane against C. F. Buckley) on the 16th day of November, 1898, was modified by substituting for the words and figures "first (1st) day of January, one thousand eight hundred and ninety-nine," where the same occur, on pages 4, 5, and 6 of said former decree, the words and figures "first (1st) day of November, 1899."

3. The Court erred in sustaining defendants' objection to the question addressed to plaintiff, Henry A. Crane, as follows: "State, Mr. Crane, what was the value of the use and occupancy of that land from the 3d day of January, 1899, to the 4th day of November, 1899."

4. The Court erred in sustaining defendants' objection to the question addressed to said witness, Henry A Crane, as follows: "What was the value, from your knowledge of the use and occupancy of that land from the 3d day of January, 1899, to the first day of November, 1899?"

5. The Court erred in sustaining defendants' objection to the offer made by plaintiff to prove by said witness, Henry A. Crane, "That the value of the use and occupation of the real property described in the judgment and decree, copy of which is annexed to and made a part of the complaint on file herein and marked Exhibit 'A' from the 3d day of January, 1899, to the 4th day of November, 1899, was and is the sum of over $5,500."

6. The Court erred in sustaining defendants' objection to the offer made by plaintiff while said Henry A. Crane was on the witness stand in words as follows: "Mr. Cushing.—We offer to prove by the witness, Henry A. Crane, that defendant, C. F. Buckley, caused and committed waste upon and of said real property described in said judgment and decree, a copy of which is annexed to and made a part of the complaint on file herein and marked Exhibit 'A,' between the 3d day of January, A. D., 1899, and the first day of November, A. D., 1899, to the extent of and in the amount of over $2,500."

7. The Court erred in sustaining defendants' objection to the offer made while said plaintiff, Henry A. Crane, was on the witness-stand as follows: "That said waste consisted in tearing up, severing and removing from said real property a steam boiler, engines, machinery and appurtenances which were, up to the time of the tearing up, severing and removal thereof, built in brickwork and affixed to said real property, and formed a part thereof, and were built, placed and constructed for use, and were used, in and for the purpose

of carrying on and operating a creamery thereon; and also in tearing up, severing and removing from said real property three water pumps, with windmill and tower affixed to each for working the same, and also two other water pumps with a horse-power machine affixed to each for working the same, and also two other water pumps, all of which were built, placed and constructed for use, and were used for pumping water from water wells, and all of which were set in and affixed to said real property, and formed a part thereof."

8. The Court erred in granting defendants' motion to strike out the answer of the witness, Malloch, as follows: "I would say about $3,500, and also in sustaining defendants' objection to the question asked said witness as follows: 'Mr. Malloch, what was the value of the use and occupation of that ranch known as the Crane-Buckley tract from the 3d day of January, 1899, to the 4th day of November, 1899.'"

9. The Court erred in sustaining defendants' objection to the offer made while the witness, Malloch, was on the witness-stand, wherein the plaintiff offered to prove "That the value of the use and occupation of the real property described in the judgment and decree, a copy of which is annexed to and made a part of the complaint on file herein and marked Exhibit 'A' from the 3d day of January, 1899, to the 4th day of November, 1899, was and is the sum of over $5,500.

10. The Court erred in sustaining defendants objection to the question addressed to said witness, Malloch, as follows: "Q. (By Mr. Cushing.) Mr. Malloch, do you

know the condition of that ranch with respect to the value of its use and occupation during the years of 1898-1897?"

11. The Court erred in granting the motions of defendants to strike out the answer of the witness, Malloch, as follows: "A. They were removed in August, 1899."

12. The Court erred in sustaining the objection of defendants to the question asked of the witness, Malloch, as follows: "Do you know, Mr. Malloch, whether those articles that have been designated were on the premises known as the Crane-Buckley ranch after the 3d day of January, 1899, and in place thereon?"

13. The Court erred in sustaining the objection of defendants to the question asked of the witness, Malloch, as follows: "Q. (By Mr. Cushing.) Do you know, Mr. Malloch, whether those articles that have been designated were on the premises known as the Crane-Buckley ranch after the 3d day of January, 1899, and in place thereon?"

14. The Court erred in sustaining defendants' objection to the offer of plaintiff while the witness, Malloch, was on the stand, contained in the following words: "Mr. Cushing.—We offer to prove by this witness now on the stand that the articles designated in the complaint were on that ranch and in place there affixed to the premises, prior to and at the time the bond in suit was given."

15. The Court erred in sustaining defendants' objection to the offer made by plaintiff to prove that the wit-

ness, Malloch, was competent to testify as to the manner in which the various articles designated in the complaint were affixed to said premises.

16. The Court erred in sustaining objection of defendants to the offer of the plaintiff while the witness, Malloch, was on the stand, to prove the amount of waste committed on the premises between the third day of January and the 4th day of November, 1899.

17. The Court erred in sustaining defendants' objection to the question addressed to said witness, Con. O'Neill, in words as follows: "With your Honor's permission, I will ask Mr. O'Neill, from the knowledge you have of this land and the neighboring lands, and lands located even within the body of this land from the year 1890 down to 1898, and knowing the amount of alfalfa that was planted on this Crane ranch, and knowing of the amount of water that was there ready for irrigation, stock and the like, and these long ditches, and many of them, will you please state to the Court and jury how much would be in your opinion, and how much was, the value of the use and occupation of that entire Buckley ranch during the period between the first day of January, 1899, and the 4th day of November, 1899."

18. The Court erred in sustaining defendants' objection made while the witness, Con. O'Neill, was on the stand to plaintiff's offer to prove the value of the use and occupation of said premises between the 3d day of January and the first day of November, 1899.

19. The Court erred in sustaining defendants' objection to the offer made to prove by the witness, Con.

O'Neill, which offer was in words as follows: "Mr. Cushing.—We offer to prove by this witness that all of the machinery and appliances referred to in the complaint were affixed to the soil, and that they were in place on that ranch on and prior to January 3d, 1899."

20. The Court erred in sustaining defendants' objection to the offer made to prove by the witness, O'Neill, which offer was in words as follows: "Mr. Cushing.—We offer to prove by Mr. O'Neill, this witness, that those various articles designated in the complaint were affixed to the soil at that time and formed a part thereof."

21. The Court erred in sustaining defendants' objection to the offer made to prove by the witness, Con. O'Neill, in words as follows: "Mr. Cushing.—We also offer to prove that they were then and there during the year 1899 of the value of $2,500."

22. The Court erred in sustaining defendants' objection to the question asked the witness, O'Neill, as follows: "Q. How was the boiler fastened?"

23. The Court erred in sustaining defendants' objection to the question asked said witness, O'Neill, "How was the brick placed or fastened?"

24. The Court erred in sustaining defendants' objection to the question asked said witness, O'Neill: "Q. How was the engine fastened?"

25. The Court erred in sustaining defendants' objection to the offer made to prove by the witness, O'Neill, which offer was in words as follows: "Mr. Cushing.—We offer to prove by this witness that the articles referred to in the complaint, were in place or rather were

all affixed to the premises and formed a part thereof at the time the bond in suit was given."

26. The Court erred in sustaining defendants' objection to the offer made to prove by the testimony of the witness, O'Neill, which offer was in words as follows: "Mr. Cushing.—We also offer to prove that Mr. O'Neill, the witness, was qualified from actual knowledge, having been in charge of that ranch, with the situation and state of affairs of all those fixtures, to testify as to their condition and value."

27. The Court erred in sustaining defendants' objection to the offer to prove by the witnesses, Daniel Zumwalt and Louis M. Howell, "that the value of the articles set forth in the complaint and claimed to be fixtures at the time that they were removed from the premises in the year 1899 was the sum of $2,500."

28. The Court erred in refusing to give to give to the jury the following instructions at the request of plaintiff: "The privilege awarded to defendant, Cornelius F. Buckley, by the United States Circuit Court of Appeals, in and for the Ninth Circuit, in its opinion and judgment, in passing upon and denying his petition for a rehearing of his appeal to that Court, whereby it allowed him until the 1st day of November, 1899, to make the payments provided for in and by the judgment, constitutes no defense to this action, because he did not avail himself of that privilege, and he did not pay or attempt to pay any part of the moneys for the payment of which he asked and was allowed the extended time mentioned."

29. The Court erred in refusing to give to the jury the following instructions at the request of the plaintiff: "The defendant, C. F. Buckley, failed to make good his appeal, and failed to prosecute his appeal to effect in the case of Henry A. Crane against him so appealed by him to the United States Circuit Court of Appeals in and for the Ninth Circuit, on which appeal the bond sued upon in this action was given and executed by the defendants herein."

30. The Court erred in refusing to give to the jury the following instructions at the request of the plaintiff: "Real or immovable property consists of land, and that which is affixed to land; and that which is incident or appurtenant to land. A thing is deemed to be affixed to land, when permanently resting upon it, as in case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.

If you find from the evidence that the steam boiler, engines, machinery and appurtenances for creamery use, and the three water pumps with a windmill and tower attached to each, and two other water pumps with horse-power machine attached to each, and two other water pumps, or any of them, were affixed to the land described in the complaint herein, or permanently resting upon said land, or permanently attached to what was permanently resting on or attached to said land, and that between the 3d day of January, 1899, and the 4th day of November, 1899, defendant, Cornelius F. Buckley, caused or permitted either one or more of said

articles or of the appurtenances thereto to be severed and removed from said land, you will then consider the evidence as to the value of such article or articles so severed and removed and include such value in and as part of your verdict for and in favor of plaintiff and against the defendants herein, not exceeding the sum claimed by plaintiff for waste, to wit, the sum of twenty-five hundred (2,500) dollars."

31. The Court erred in giving to the jury the charge set forth and contained in the bill of exceptions of said plaintiff on appeal from said judgment, and in giving to said jury each and every part and paragraph of the instructions contained in said charge as therein set forth.

32. The Court erred in instructing the jury as follows: "Under the law of this case the plaintiff is not entitled to recover either for use and occupation or for waste prior to the first day of November, 1899, under the terms of the modified decree."

33. The Court erred in giving to the jury the following instructions: "That leaves the only question for you to determine, first, as to whether or not Buckley vacated those premises on or before the first day of November, 1899, and if he did not, then the value of the use and occupation for the remainder of the time from the first day of November until the 4th day of November."

Dated San Francisco, Cal., October 14th, A. D., 1904.

Respectfully submitted,

CUSHING, GRANT & CUSHING,

Attorneys for Plaintiff.

[Endorsed]: Filed October 14, 1904. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

HENRY A. CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS, and TIMOTHY HOPKINS,
Defendants.
No. 12,884.

Order Allowing Writ of Error.

Henry A. Crane, the plaintiff in the above-entitled action, having filed in the above-entitled Court his petition for a writ of error; now, on motion of Messrs. Cushing, Grant & Cushing, the counsel for said plaintiff, it is ordered that a writ of error be, and the same is hereby allowed, according to the statutes in such cases made and provided, and in order to stay execution upon the writ of error, said plaintiff shall file a supersedeas bond in the sum of five hundred ($500) dollars.

Dated San Francisco, Cal., Oct. 14, A. D., 1904.

WM. W. MORROW,

Judge of the Circuit Court of the United States in and for the Ninth Judicial Circuit, Northern District of California.

[Endorsed] Filed October 14, 1904. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California.

HENRY A. CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS, and TIMOTHY HOPKINS,
Defendants.
No. 12,884.

Bond on Writ of Error.

Know all men by these presents, that we, Henry A. Crane, as principal, and James E. Damon and Joseph Nash, as sureties, are held and firmly bound unto Cornelius F. Buckley, Timothy Hopkins and Rudolph Spreckels, and to each of them, in the sum of five hundred ($500) dollars, to be paid to said Cornelius F. Buckley, Timothy Hopkins and Rudolph Spreckels, their heirs, executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of October, 1904.

Whereas, lately, at a session of the Circuit Court of the United States, Ninth Circuit, Northern District of California, in a suit pending in said court between

Henry A. Crane, as plaintiff, and Cornelius F. Buckley, Timothy Hopkins and Rudolph Spreckels, as defendants, a judgment was rendered on the 17th day of August, 1904, against said plaintiff, Henry A. Crane, and in favor of said defendants, Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins; and,

Whereas, on the 14th day of October, A. D. 1904, said plaintiff filed in said court a petition for an order allowing him to prosecute a writ of error in the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and for an order of said Circuit Court fixing the amount of security which said plaintiff shall be required to give to said defendants pending the prosecution of said writ of error to operate as a supersedeas and stay of execution until said writ of error shall have been heard and determined in said Circuit Court of Appeals.

Whereas, on the 14th day of October, A. D. 1904, said Circuit Court, upon said petition, entered of record an order allowing a writ of error in said action in favor of plaintiff from said judgment to said Circuit Court of Appeals, Ninth Circuit, and in said order fixed the amount of security which the said above bounded should be required to give pending determination of said cause in said Circuit Court of Appeals and to stay execution herein at the sum of five hundred ($500) dollars.

Now, therefore, the condition of this obligation is such, that if Henry A. Crane, the plaintiff, shall prosecute said writ of error to effect and answer all costs and damages, if he shall fail to make good his plea, then this

obligation to be void; otherwise it shall be and remain in full force and virtue.

HENRY A. CRANE.
JAS. E. DAMON.
JOSEPH NASH.

Northern District of California.
United States of America, } ss.

James E. Damon and Joseph Nash, being duly sworn, each for himself deposes and says, that he is a freeholder in said district and is worth the sum of $500, exclusive of property exempt from execution, over and above all his debts and liabilities.

JAS. E. DAMON.
JOSEPH NASH.

Subscribed and sworn to before me this 14th day of October, A. D. 1904.

[Seal] P. J. KENNEDY,
Notary Public in and for the City and County of San Francisco, State of California.

The sureties upon the foregoing bond are satisfactory to us.

THEO. J. ROCHE,
SULLIVAN & SULLIVAN,
D. M. DELMAS,
Attorneys for Defendants in Error.

The foregoing and within bond is hereby approved this 14th day of October, A. D. 1904.

WM. W. MORROW,

Judge of the Circuit Court of the United States in and for the Ninth Judicial Circuit, Northern District of California.

[Endorsed]: Filed October 14, 1904. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

HENRY A. CRANE,
Plaintiff,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants.
No. 12,884.

Clerk's Certificate to Record on Writ of Error.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, Ninth Judicial Circuit, Northern District of California, do hereby certify the foregoing one hundred and thirty-six (136) pages, numbered from 1 to 136, inclusive, to be a full, true and correct copy of the record and the proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said court, and

that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $83.40, that said amount was paid by the plaintiff's attorneys, and that the original writ of error and original citation issued herein are hereto annexed.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said Circuit Court, this 1st day of November, A. D. 1904.

[Seal] SOUTHARD HOFFMAN,

Clerk of United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States, To the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Henry A. Crane, plaintiff in error, and Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins, defendants in error, a manifest error hath happened, to the great damage of the said Henry A. Crane, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to

the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the twelfth day of November next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 14th day of October, in the year of our Lord one thousand nine hundred and four.

[Seal] SOUTHARD HOFFMAN,

Clerk of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California.

Allowed by:

WM. W. MORROW,

Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this 15th day of October, 1904.

SULLIVAN & SULLIVAN,
THEO. J. ROCHE and
D. M. DELMAS,
Attorneys for Defendants in Error.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] SOUTHARD HOFFMAN,
Clerk.

[Endorsed]: Original. No. 12,884. Circuit Court of the United States, Ninth Circuit, Northern District of California. Henry A. Crane, Plaintiff in Error, vs. Cornelius F. Buckley, et al., Defendants in Error. Writ of Error. Filed October 17th, 1904. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Fran-

cisco, in the State of California, on the 12th day of November, 1904, being within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, for the Northern District of California wherein Henry A. Crane, is plaintiff, and you are defendants, to show cause, if any there be, why the judgment rendered against the said plaintiff, as in the said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM W. MORROW, United States Circuit Judge for the Ninth Judicial Circuit, at San Francisco, this 14th day of October, A. D. 1904.

WM. W. MORROW,
United States Circuit Judge.

Service of within citation, by copy, admitted this 15th day of October, A. D. 1904.

SULLIVAN & SULLIVAN,
THEO. J. ROCHE, and
D. M. DELMAS,
Attorneys for Defendants in Error.

[Endorsed]: Original. No. 12,884. In the Circuit Court of the United States for the Ninth Circuit, Northern District of California. Henry A. Crane vs. Cornelius F. Buckley et al. Citation. Filed October 17th, 1904. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 1130. United States Circuit Court of Appeals for the Ninth Circuit. Henry A. Crane, Plaintiff in Error, vs. Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Northern District of California.

Filed November 3, 1904.

F. D. MONCKTON,
Clerk.

United States Circuit Court of Appeals, for the Ninth Circuit.

HENRY A. CRANE,
Plaintiff in Error,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants in Error.
No. 1130.

Certificate of Clerk United States Circuit Court of Appeals to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and fifty-five (155) pages, numbered from one (1) to one hundred and fifty-five (155), inclusive, including the index and cover thereto, to be a true copy of the printed transcript of record upon writ of error to the United States Circuit Court for the Northern District of California in the above-entitled case, as the original and copies thereof were printed under my supervision, pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit, and as the said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 29th day of May, A. D. 1905.

[Seal] F. D. MONCKTON,
Clerk.

PROCEEDINGS

HAD IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

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At a stated term, to wit, the October term A. D. 1904, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Monday, the twenty-seventh day of February, in the year of our Lord one thousand nine hundred and five. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable THOMAS P. HAWLEY, District Judge.

HENRY A. CRANE,
Plaintiff in Error,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants in Error.
No. 1130.

Order of Submission.

Ordered, cause argued by Mr. Charles S. Cushing, counsel for the plaintiff in error, and Mr. T. J. Roche, counsel for the defendants in error, and submitted to the Court for consideration and decision.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

HENRY A. CRANE,
Plaintiff in Error,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants in Error.
No. 1130.

In Error to the United States Circuit Court for the Northern District of California.

Opinion of United States Circuit Court of Appeals.

CUSHING, GRANT & CUSHING, Attorneys for Plaintiff in Error.

THEODORE J. ROCHE, MATTHEW I. SULLIVAN, and J. F. SULLIVAN, Attorneys for Defendants in Error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, delivered the opinion of the court.

The only point involved in this writ of error is, "Did the defendant Buckley prosecute his appeal to effect?" This question was answered in the affirmative by this Court in Buckley vs. Crane, 123 Federal, 29, 33. The rulings of the Court below in the trial of the present case

were in accord with the views heretofore expressed by this Court.

The judgment of the Circuit Court is affirmed.

[Endorsed]: Opinion. Filed May 8, 1905. F. D. Monckton, Clerk.

United States Circuit Court of Appeals, for the Ninth Circuit.

HENRY A. CRANE,
Plaintiff in Error,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants in Error.
No. 1130.

Judgment United States Circuit Court of Appeals.

In error to the Circuit Court of the United States for the Northern District of California.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of California, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

[Endorsed]: Judgment. Filed and entered May 8, 1905. F. D. Monckton, Clerk.

At a stated term, to wit, the October term A. D. 1904, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City and County of San Francisco, on Thursday, the eighteenth day of May, in the year of our Lord one thousand nine hundred and five. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable THOMAS P. HAWLEY, District Judge.

HENRY A. CRANE,
Plaintiff in Error,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants in Error.
No. 1130.

Order that Copy of Opinion in Buckley et al. vs. Crane, No. 938, be Incorporated in Transcript of Record.

Upon motion of Mr. Charles S. Cushing, counsel for the plaintiff in error, it is ordered that a copy of the opinion of this Court in the case of Cornelius F. Buckley et al., plaintiffs in error, vs. Henry A. Crane, defendant in error, No. 938, be incorporated in and made a part of the transcript of record in the above-entitled cause upon the return to the writ of error therein from the Supreme Court of the United States.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

CORNELIUS F. BUCKLEY et al.,
Plaintiffs in Error,
vs.
HENRY A. CRANE,
Defendant in Error.
No. 938.

Upon Writ of Error to the United States Circuit Court, for the Northern District of California.

Opinion of United States Circuit Court of Appeals.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge, delivered the opinion of the Court.

The defendant in error, Crane, and the plaintiff in error, Buckley, having entered into a contract by which Crane contracted to sell and Buckley to purchase of him a certain tract of land, and certain water, water rights, and rights of way into the possession of which Buckley entered under the contract and paid a portion of the purchase price, but thereafter failed to make other payments as required by the contract. Crane commenced a suit in the Circuit Court of the United States for the Southern District of California, for the foreclosure of Buckley's interest in the property, and the recovery of its possession from him, in which suit the court, on the 16th day of November, 1898, entered a decree adjudging the complainant, Crane, to be the owner in fee of the property men-

tioned, and further adjudging and decreeing "That all the rights, interests and claims of said respondent, Cornelius F. Buckley, in and to said real property, water ditches, water rights, and rights of way, and every part thereof, have been and are forever foreclosed and terminated, subject only to the equitable privilege, to wit, inasmuch as said respondent has made some payments to complainant under an agreement dated June 9th, A. D. 1892, mentioned in the bill of complaint, to purchase said real property, water ditches, water rights, and rights of way, notwithstanding his failure to comply with the provisions of said agreement as to the payment of the remainder of said purchase price, and as to other matters therein provided to be performed, this court decrees as equitable that the privilege shall be and hereby is given to said respondent, Cornelius F. Buckley, to pay to said complainant, Henry A. Crane, at any time up to the first (1st) day of January, A. D. one thousand eight hundred and ninety-nine (1899), the unpaid portion of said purchase price of said property, viz., sixty thousand ($60,000) dollars, in United States gold coin, and interest thereon in like gold coin from the 18th day of March, A. D. one thousand eight hundred and ninety-four (1894), at the rate of nine (9) per centum per annum, until such payment is made, and also to pay to said complainant, Henry A. Crane, all taxes and assessments levied upon or against said property, or any part thereof, paid by him, Henry A. Crane, after the same became or shall become delinquent, including penalties and costs thereon and interest upon the whole at the rate of nine (9) per centum per annum from the time of payment

thereof by said Henry A. Crane, and also to pay to said complainant, Henry A. Crane, all moneys which he shall hereafter expend in keeping and maintaining good and substantial head-gates at the heads of said two water ditches herein described, upon the failure of said respondent, Cornelius F. Buckley, to keep and maintain such head-gates in good order, and interest upon the same at the rate of nine (9) per centum per annum from the date of such expenditure by complainant, Henry A. Crane; and upon the payment of said several amounts of money to said Henry A. Crane, on or before said first day of January, A. D. 1899, he shall convey to said Cornelius F. Buckley said real property, water ditches, water rights, and rights of way to the extent named and as provided in said agreement of sale and purchase dated June 9th, A. D. 1892, mentioned in the bill of complaint herein. But in case said respondent, Cornelius F. Buckley, shall fail to pay to complainant, Henry A. Crane, the said amounts of money hereinbefore designated and mentioned on or before the first day of January, A. D. 1899, then and in that event it is ordered, adjudged, and decreed that all the rights, interests and claims of said respondent, Cornelius F. Buckley, and all persons and parties claiming under him in and to said real property, water ditches, water rights, and rights of way, and every part thereof, shall be forever foreclosed and terminated, and that said Cornelius F. Buckley, and all parties claiming under him, be removed and turned out of and from the possession, use, and occupation of said real property, water ditches, water rights, and rights of way, and that said complainant,

Henry A. Crane, or his legal representatives, be placed in, and restored to, the actual and exclusive possession, use, and occupation of said real property, water ditches, water rights and rights of way, and every part thereof, and thereafter maintained and kept in said possession, use, and occupation thereof, as against said respondent, Cornelius F. Buckley, and all persons and parties claiming under him; and that respondent, Cornelius F. Buckley, and all persons and parties claiming under him, are and shall continue to be enjoined and forbidden from setting up or asserting any right, interest or claim now existing in or to said real property, water ditches, water rights, or rights of way, or any part thereof. And unless said respondent shall place on file herein some sufficient and satisfactory evidence that he has paid, or has tendered and is able, ready, and willing to pay to said complainant, Henry A. Crane, the amounts of money hereinbefore provided to be paid for the purchase of said property, on or before the first day of January, A. D. 1899, it is ordered, adjudged, and decreed that the clerk of this court do, on request of said complainant, Henry A. Crane, or of his counsel, issue a suitable and sufficient order or writ to the marshal of this court, and under the seal thereof, to remove said respondent, Cornelius F. Buckley, from the possession, use, and occupation of said real property, water ditches, water rights, and rights of way, and to place complainant, Henry A. Crane, or his legal representatives, in the exclusive possession, use and occupation thereof."

Buckley thereupon applied for and was granted an ap-

peal from that decree to this court, and, as is recited in the supersedeas bond, being "desirous of staying the execution of the said judgment so appealed from in so far as it relates to the possession of the land and premises involved therein, and desirous of staying the execution of said judgment or decree so appealed from in so far as it relates to the costs awarded to the complainant therein," executed, with his coplaintiffs in error herein, Spreckels and Hopkins, as his sureties, the supersedeas bond which is the subject of the present action—the condition of such bond being "that if the said C. F. Buckley shall prosecute his appeal to effect, and shall answer all damages and costs that have been and shall be awarded against him if he fails to make his appeal good, and if he shall answer all damages that shall accrue to the said respondent by reason of the value of the use and occupation of the land and premises from the time of said appeal until the delivery of possession thereof to said Henry A. Crane, and from all waste committed thereon, then the above obligation to be void, else to remain in full force and effect."

On the second day of October, 1899, this Court gave its judgment affirming the decree of the Circuit Court of November 16, 1898, which decision of affirmance was, on a petition for a rehearing of the cause, modified by this Court in this language: "The record does show that the appellant (Buckley) made large payments under the contract, and that he has made other large expenditures in the improvement of the property which was the subject of the contract. It is also true that the sums remaining due from the appellant under the con-

tract were large. These payments the decree of the court below, which was entered on the 16th day of November, 1898, required to be made prior to January 1st, 1899, in order that the rights and interests of the appellant in the property be saved, which were by the decree otherwise forever foreclosed and ended. Under the circumstances appearing in the record this Court is of the opinion that it is equitable and just to allow the appellant until the 1st day of November, 1899, within which to make the payments required by the decree from which the appeal is taken, and, accordingly, it is ordered that the judgment of this Court entered herein on the 2d day of October, 1899, be, and hereby is, so modified as to read: 'Cause remanded to the court below with directions to substitute for the first day of January, 1899, the first day of November, 1899, within which the payments therein provided for are permitted to be made, and, as so modified, the decree is affirmed."

Thereafter, the mandate of this Court issued to the lower court, by which that Court was directed to modify its decree by substituting for the first day of January, 1899, the first day of November, 1899, within which the payments therein provided for were permitted to be made. Pursuant to that writ of the Circuit Court made and entered its final decree containing this provision: "It is hereby ordered, adjudged and decreed that the former decree of this court, made and entered herein on the 16th day of November, 1898, be and the same is hereby modified by substituting for the words and figures 'first (1st) day of January, one thousand eight hundred

and ninety-nine,' where the same occur on pages 4, 5 and 6 of said former decree, the words and figures 'first (1st) day of November, 1899.' "

The effect of this modifying decree was to substitute the first day of November, 1899, for the first day of January, 1899, wherever it occurred in the original decree.

The present action was commenced by the defendant in error against Buckley and his sureties, the plaintiffs in error, to recover the alleged value of the use and occupation of the property mentioned, and for waste alleged to have been committed by Buckley thereon from the first day of January, 1899, to the fourth day of November, 1899. The costs of the action were not involved, as they had been paid. Upon the trial in the court below it was shown that Buckley failed to make the deferred payments within the time fixed by the decree so modified, or at all, and that the possession of the premises was not given Crane until November 4th, 1899.

As will have been seen, the purpose of the bond sued on was the staying of the execution of the decree appealed from in so far as it related to the possession of the land and premises involved therein, and in so far as it related to the cost awarded to the complainant therein, and its condition was that Buckley should prosecute his appeal to effect, and answer all damages and costs awarded against him in the event he should fail to make his appeal good, and pay all damages that should accrue to the respondent, Crane, by reason of the value of the use and occupation of the land and premises from the

time of the appeal until the delivery of possession thereof to him, and for all waste committed thereon.

We do not understand the learned counsel for plaintiffs in error to deny that for the waste and for the value of the use and occupation of the premises by Buckley after the expiration of the time fixed by the modified decree within which he was allowed to complete the payment for the property, the plaintiffs in error are liable; but he insists that for the use and occupation of the premises by Buckley up to the expiration of that time, neither he nor his sureties are responsible on the bond. Instructions to that effect were requested by the plaintiffs in error, and refused by the court below, and, instead, the jury was instructed that the plaintiff in the action (defendant in error here) was entitled to recover upon the bond the value of the use and occupation of the land and premises from January 1st, 1899, which was the time fixed by the Circuit Court in the decree as originally entered within which Buckley was permitted to complete his payments for the land and premises, and secure title thereto. The theory of the Court evidently was that it was apparent from the original decree, as indeed it is, that Buckley was, under the contract of sale and purchase, put into possession of the premises and was entitled to their use and occupation during the life of the contract. According to the decree as originally entered that life ended January 1st, 1899, unless Buckley, prior thereto, complied with the conditions of the decree.

It is true that this Court, by its judgment first given, affirmed that decree, but upon a petition for a rehearing, it reconsidered its judgment and directed the Court below to modify the judgment from which the appeal was taken by substituting for the first day of January, 1899, the first day of November of the same year, which was done—thus extending the time within which Buckley was permitted to make the deferred payments and secure the title to the property contracted for, and, in effect, keeping in force the provisions of the agreement, including the right of possession of the premises in Buckley until the day last named. This was a substantial modification of the original decree of the Circuit Court, gained by virtue of the appeal, which cannot therefore, be properly said to have been without effect. We are of the opinion that the defendant in error was no more entitled to recover the value of the use and occupation of the premises in question during the enlarged time finally granted Buckley within which to make good his covenants, than for the period of grace first fixed by the trial court, in respect of which the defendant in error asserts no right even in his complaint.

The judgment is reversed, and cause remanded for a new trial.

[Endorsed]: Opinion. Filed May 25, 1903. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

HENRY A. CRANE,
Plaintiff in Error,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants in Error.
No. 1130.

Petition for Writ of Error.

The above-named plaintiff in error, Henry A. Crane, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit and that judgment has therein been rendered on the 8th day of May, 1905, affirming the judgment of the Circuit Court of the United States, Ninth Circuit, for the Northern District of California, in favor of said defendants in error, Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins and against said Henry A. Crane, that said plaintiff, Henry A. Crane, take nothing by said action and for the sum of $153.80 costs and that this cause is a proper cause to be reviewed by the Supreme Court of the United States on writ of error.

Wherefore said Henry A. Crane prays that a writ of error may be issued in this behalf to the Supreme Court of the United States and that the clerk of said United States Circuit Court of Appeals for the Ninth Circuit be directed to send the records and proceedings of said cause with all things concerning the same to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

CUSHING, GRANT & CUSHING,

O. K. CUSHING,

CHAS. S. CUSHING,

WILLIAM GRANT,

Attorneys for Plaintiff in Error.

Allowed May 18, 1905.

WM. B. GILBERT,

United States Circuit Judge.

[Endorsed]: No. 1130. In the United States Circuit Court of Appeals for the Ninth Circuit. Henry A. Crane, Plaintiff in Error, vs. Cornelius F. Buckley et al., Defendants in Error. Petition for Writ of Error. Filed May 18, 1905. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

HENRY A. CRANE,
Plaintiff in Error,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants in Error.
No. 1130.

Assignment of Errors.

And now comes the said plaintiff in error, Henry A. Crane, and says: That in the record herein there is manifest error, and that the United States Circuit Court of Appeals for the Ninth Circuit erred in this, to wit:

1. In holding that defendant in error, C. F. Buckley prosecuted his appeal to effect from the judgment and decree made and entered against him in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, in that certain action wherein said Henry A. Crane was plaintiff, and said C. F. Buckley was defendant and cross-complainant, referred to in plaintiff's complaint.

2. In holding and deciding that said defendant in error, C. F. Buckley, made good his appeal from the judgment and decree made and entered against him in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, in that certain action wherein said Henry A. Crane was

plaintiff and said C. F. Buckley was defendant and cross-complainant referred to in plaintiff's complaint.

3. In holding and deciding that said defendant in error, C. F. Buckley prosecuted his appeal to effect in said action referred to, as the evidence shows the exact contrary and conclusively establishes the fact that the judgment in the action wherein said C. F. Buckley was defendant and Henry A. Crane was plaintiff in the Circuit Court of the United States, Ninth Judicial Circuit in and for the Southern District of California, referred to in the complaint herein was affirmed.

4. In holding and deciding that said defendant in error, C. F. Buckley, remained in possession of the premises, described in Exhibit "A" to plaintiff's complaint, under and by virtue of the judgment rendered, in that certain action referred to in the complaint, wherein said Henry A. Crane was plaintiff and said C. F. Buckley was defendant, in the Circuit Court of Appeals upon an appeal of defendant, C. F. Buckley, from said judgment made and entered against him in said Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California in this: that it conclusively appears that he remained in possession of said premises by virtue of the supersedeas bond referred to and set forth in the complaint herein.

5. In holding and deciding that defendants in error were entitled to a verdict against plaintiff for their costs herein or at all and that plaintiff was not entitled to any relief in said action.

6. In holding and deciding that the question as to whether defendant in error Buckley, prosecuted his appeal to effect was decided in the case of Buckley vs. Crane, 123 Fed. 29-33.

7. In holding and deciding that the rulings of the trial court were in accordance with the views expressed by said Circuit Court of Appeals in said case of Buckley vs. Crane.

8. In holding and deciding that the trial court properly overruled the objection of plaintiff in error to the introduction in evidence "of the decree modifying former decree," being Defendant's Exhibit No. 1 set forth in plaintiff's bill of exceptions, the full substance of which modifying decree was and is, that thereby, the former decree made and entered in said Circuit Court of the United States, in and for the Southern District of California, in that certain action brought by Henry A. Crane against C. F. Buckley) on the 16th day of November, 1898, was modified by substituting for the words and figures "first (1st) day of January, one thousand eight hundred and ninety-nine," where the same occur on pages 4, 5 and 6 of said former decree, the words and figures "first (1st) day of November, 1899."

9. In holding and deciding that the trial court properly sustained the objections to defendants in error to the following questions and offers, to wit:

A. To the question addressed to plaintiff, Henry A. Crane, as follows: "State, Mr. Crane, what was the value of the use and occupancy of that land from the

3d day of January, 1899, to the 4th day of November, 1899."

B. To the question addressed to said witness, Henry A. Crane, as follows: "What was the value, from your knowledge of the use and occupancy of that land from the 3d day of January, 1899, to the first day of November, 1899?"

C. To the offer made by plaintiff to prove by said witness, Henry A. Crane, "That the value of the use and occupation of the real property described in the judgment and decree, copy of which is annexed to and made a part of the complaint on file herein and marked Exhibit 'A' from the 3d day of January, 1899, to the 4th day of November, 1899, was and is the sum of over $5,500."

D. To the offer made by plaintiff while said Henry A. Crane was on the witness-stand in words as follows: "Mr. Cushing.—We offer to prove by the witness, Henry A. Crane, that defendant, C. F. Buckley, caused and committed waste upon and of said real property described in said judgment and decree, a copy of which is annexed to and made a part of the complaint on file herein and marked Exhibit 'A' between the 3d day of January, A. D. 1899, and the first day of November, A. D. 1899, to the extent of and in the amount of over $2,500."

E. To the offer made while said plaintiff, Henry A. Crane was on the witness-stand as follows: "That said waste consisted in tearing up, severing and removing

from said real property a steam-boiler, engines, machinery and appurtenances which were, up to the time of the tearing up, severing and removal thereof, built in brickwork and affixed to said real property, and formed a part thereof, and were built, placed and constructed for use, and were used, in and for the purpose of carrying on and operating a creamery thereon; and also in tearing up, severing and removing from said real property three water pumps, with windmill and tower affixed to each for working the same, and also two other water pumps with a horse-power machine affixed to each for working the same, and also two other water pumps, all of which were built, placed and constructed for use, and were used for pumping water from water-wells, and all of which were set in and affixed to said real property and formed a part thereof."

F. To the offer made while the witness, Malloch, was on the witness-stand, wherein the plaintiff offered to prove "That the value of the use and occupation of the real property described in the judgment and decree, a copy of which is annexed to and made a part of the complaint on file herein and marked Exhibit 'A' from the 3d day of January, 1899, to the 4th day of November, 1899, was and in the sum of over $5,000."

G. To the question addressed to said witness, Malloch, as follows: "Q. (By Mr. Cushing.) Mr. Malloch, do you know the condition of that ranch with respect to the value of its use and occupation during the years of 1898-1897?"

H. In sustaining the objection of defendants to the question asked of the witness, Malloch, as follows: "Do you know, Mr. Malloch, whether those articles that have been designated were on the premises known as the Crane-Buckley ranch after the 3d day of January, 1899, and in place thereon?"

I. To the question asked of the witness, Malloch, as follows: "Q. (By Mr. Cushing.) Do you know, Mr. Malloch, whether those articles that have been designated were on the premises known as the Crane-Buckley ranch after the 3d day of January, 1899, and in place thereon?"

J. To the offer of plaintiff while the witness, Malloch, was on the stand, contained in the following words: "Mr. Cushing.—We offer to prove by this witness now on the stand that the articles designated in the complaint were on that ranch and in place there affixed to the premises, prior to and at the time the bond in suit was given."

K. To the offer made by plaintiff to prove that the witness, Malloch, was competent to testify as to the manner in which the various articles designated in the complaint were affixed to said premises.

L. To the offer of the plaintiff while the witness, Malloch, was on the stand, to prove the amount of waste committed on the premises between the third day of January and the 4th day of November, 1899.

M. To the question addressed to said witness, Con. O'Neill, in words as follows: "With your Honor's per-

mission, I will ask Mr. O'Neill, from the knowledge you have of this land and the neighboring lands, and lands located even within the body of this land from the year 1890 down to 1898, and knowing the amount of alfalfa that was planted to on this Crane ranch, and knowing of the amount of water that was there ready for irrigation, stock and the like, and these long ditches, and many of them, will you please state to the Court and jury how much would be, in your opinion, and how much was, the value of the use and occupation of that entire Buckley ranch during the period between the first day of January, 1899, and the 4th day of November, 1899."

N. To the offer, while witness Con. O'Neill was on the stand to prove the value of the use and occupation of said premises between the 3d day of January and the 1st day of November, 1899.

O. To the offer made to prove by the witness, Con. O'Neill, which offer was in words as follows: "Mr. Cushing.—We offer to prove by this witness that all of the machinery and appliances referred to in the complaint were affixed to the soil, and that they were in place on that ranch on and prior to January 3d, 1899."

P. To the offer made to prove by the witness, O'Neill, which offer was in words as follows: "Mr. Cushing.—We offer to prove by Mr. O'Neill, this witness, that those various articles designated in the complaint were affixed to the soil at the time and formed a part thereof."

Q. To the offer made to prove by the witness, Con. O'Neill, in words as follows: "Mr. Cushing.—We also

offer to prove that they were then and there during the year 1899 of the value of $2,500."

R. To the questions asked the witness, O'Neill, as follows: "Q. How was the boiler fastened?" and "How was the engine fastened?"

S. To the question asked said witness, O'Neill, "How was the brick placed or fastened?"

T. To the offer made to prove by the witness, O'Neill, which offer was in words as follows: "Mr. Cushing.—We offer to prove by this witness that the articles referred to in the complaint were in place or rather were all affixed to the premises and formed a part thereof at the time the bond in suit was given."

U. To the offer made to prove by the testimony of the witness, O'Neill, which offer was in words as follows: "Mr. Cushing.—We also offer to prove that Mr. O'Neill, the witness, was qualified from actual knowledge, having been in charge of that ranch, with the situation and state of affairs, of all those fixtures, to testify as to their condition and value."

V. To the offer to prove by the witness, Daniel Zumwalt and Louis M. Howell, "that the value of the articles set forth in the complaint and claimed to be fixtures at the time they were removed from the premises in the year 1899 was the sum of $2,500."

10. In holding and deciding that the trial court properly granted defendants' motion to strike out the answer of the witness Malloch as follows: "I would say about $3,500"; and also in sustaining defendant's ob-

jection to the question asked said witness as follows: "Mr. Malloch, what was the value of the use and occupation of that ranch known as the Crane-Buckley tract from the 3d day of January, 1899, to the 3d day of November, 1899?"

11. In holding and deciding that the trial court properly granted defendants' motion to strike out the answer of the witness Malloch as follows: "A. They were removed in August, 1899."

12. In holding and deciding that the trial court properly excluded all evidence offered by plaintiff Henry A. Crane, as to the value of the use and occupation of said premises between the 3d day of January and the 1st day of November, 1899.

13. In holding and deciding that the trial court properly excluded all evidence as to the amount of waste committed on said premises between the 3d day of January and the 1st day of November, 1899.

14. In holding and deciding that the trial court properly refused to give to the jury the following instructions at the request of the plaintiff:

A. "The privilege awarded to defendant, Cornelius F. Buckley, by the United States Circuit Court of Appeals, in and for the Ninth Circuit, in its opinion and judgment in passing upon and denying his petition for a rehearing of his appeal to that Court, whereby it allowed him until the 1st day of November, 1899, to make the payments provided for in and by the judgment, constitutes no defense to this action, because he did not

avail himself of that privilege, and he did not pay or attempt to pay any part of the moneys for the payment of which he asked and was allowed the extended time mentioned."

B. "The defendant C. F. Buckley failed to make good his appeal, and failed to prosecute his appeal to effect in the case of Henry A. Crane against him so appealed by him to the United States Circuit Court of Appeals in and for the Ninth Circuit, on which appeal the bond sued upon in this action was given and executed by the defendants herein."

C. "Real or immovable property consists of land, and that which is affixed to land; and that which is incident or appurtenant to land. A thing is deemed to be affixed to land, when permanently resting upon it, as in case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screw.

"If you find from the evidence that the steam boiler, engines, machinery and appurtenances for creamery use, and the three water pumps with a windmill and tower attached to each, and two other water pumps with horse-power machine attached to each, and two other water pumps, or any of them, were affixed to the land described in the complaint herein, or permanently resting upon said land, or permanently attached to what was permanently resting on or attached to said land, and that between the 3d day of January, 1899, and the 4th day of November, 1899, defendant, Cornelius F.

Buckley, caused or permitted either one or more of said articles or of the appurtenances thereto to be severed and removed from said land, you will then consider the evidence as to the value of such article or articles so severed and removed and include such value in and as part of your verdict for and in favor of plaintiff and against the defendants herein, not exceeding the sum claimed by plaintiff for waste, to wit, the sum of twenty-five hundred (2,500) dollars."

15. In holding and deciding that the trial court properly gave to the jury the charge set forth and contained in bill of exceptions of said plaintiff on appeal from said judgment, and in giving to said jury each and every number and paragraph of the instructions contained in such charge as therein set forth.

16. In holding that the trial court properly gave to the jury the following instructions:

"Under the law of this case the plaintiff is not entitled to recover either for use and occupation or for waste, prior to the first day of November, 1899, under the terms of the modified decree."

17. In holding and deciding that the trial court properly gave to the jury the following instructions:

"That leaves the only question for you to determine, first, as to whether or not Buckley vacated those premises on or before the first day of November, 1899, and if he did not, then the value of the use and occupation for the remainder of the time from the first day of November until the 4th day of November."

Wherefore, said plaintiff in error prays that said judgment may be reversed in all things.

CUSHING, GRANT & CUSHING,
O. K. CUSHING,
CHAS. E. CUSHING,
WILLIAM GRANT,
Attorneys for Plaintiff in Error.

[Endorsed]: No. 1130. In the United States Circuit Court of Appeals for the Ninth Circuit. Henry A. Crane, Plaintiff in Error, vs. Cornelius F. Buckley et al., Defendants in Error. Assignment of Errors. Filed May 18, 1905. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

HENRY A. CRANE,
Plaintiff in Error,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants in Error.
No. 1130.

Order Allowing Writ of Error.

On this 18th day of May, 1905, came plaintiff in error, by his attorneys, and filed herein and presented to the Court his petition praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the records and proceedings and papers

of said cause duly authenticated may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof said writ of error is allowed upon said plaintiff in error giving bond according to law in the sum of five hundred ($500) dollars, which shall operate as a supersedeas bond.

And it is further ordered that said petition be, and the same is hereby, allowed and granted and that the writ of error be allowed in said cause returnable before the United States Supreme Court on the seventeenth day of July, 1905, and that the clerk of this Court sign and seal the writ, and that a transcript of the records and of all proceedings and papers in said cause shall be made and transmitted to the United States Supreme Court.

It is further ordered that the undertaking in the sum of five hundred ($500) dollars tendered by said plaintiff be, and the same is, hereby approved as an undertaking on a writ of error herein.

Dated San Francisco, May 18, 1905.

WM. B. GILBERT,

Judge of the United States Circuit Court of Appeals, Ninth Circuit.

[Endorsed]: No. 1130. In the United States Circuit Court of Appeals for the Ninth Circuit. Henry A. Crane, Plaintiff in Error, vs. Cornelius F. Buckley, Defendant in Error. Order Allowing Writ of Error, etc. Filed May 18, 1905. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

HENRY A. CRANE,
Plaintiff in Error,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants in Error.
No. 1130.

Bond.

Know all men by these presents, that we, Henry A. Crane, as principal, and Charles W. Pope and Thomas Mullany, as sureties, are held and firmly bound unto Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins, and unto each of them, in the sum of five hundred ($500) dollars, to be paid to said Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins, their heirs, representatives or assigns, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns firmly by these presents.

Signed, executed and dated this 18th day of May, 1905.

Whereas the above-named plaintiff in error, Henry A. Crane, has sued out a writ of error to the Supreme

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Court of the United States to reverse the judgment of said United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled case made and entered on the 8th day of May, 1905, affirming the judgment in the above-entitled case for the sum of $153.80 costs, made and entered in favor of said defendants in error and against said plaintiff in error on or about the 17th day of August, 1904, in the Circuit Court of the United States, Northern District of California.

Now, therefore, the condition of this obligation is such that if the above-named Henry A. Crane shall prosecute said writ of error to effect and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

HENRY A. CRANE.
CHAS. W. POPE.
THOS. MULLANY.

Northern District of California,
United States of America. } ss.

Chas. W. Pope and Thos. Mullany, being duly sworn each for himself, deposes and says: That he is a freeholder in said district and is worth the sum of five hundred ($500) dollars, exclusive of property exempt from execution over and above all his debts and liabilities.

CHAS. W. POPE.
THOS. MULLANY.

Subscribed and sworn to before me this 18th day of May, A. D. 1905.

[Seal] P. J. KENNEDY,

Notary Public in and for the City and County of San Francisco, State of California.

The within named sureties are satisfactory to us.

SULLIVAN & SULLIVAN,

D. M. DELMAS and

THEODORE J. ROCHE.

Attys. for Defendants.

The foregoing bond is approved this 18th day of May, A. D. 1905.

WM. B. GILBERT,

United States Circuit Judge.

[Endorsed]: No. 1130. In the United States Circuit Court of Appeals for the Ninth Circuit. Henry A. Crane, Plaintiff in Error, vs. Cornelius F. Buckley et al., Defendants in Error. Bond. Filed May 18, 1905. F. D. Monckton, Clerk.

Writ of Error. (Copy.)

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable Justices of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea, which is in the said

Circuit Court of Appeals, before you or some of you, between the said Henry A. Crane, plaintiff in error, and Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins, defendants in error, a manifest error hath happened to the great damage of said plaintiff in error, as by his complaint appears. We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal distinctly and openly you send the record and proceedings, aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same in the Supreme Court at Washington, District of Columbia, on the 17th day of July, 1905, that the record and proceedings, aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 18th day of May, in the year of our Lord one thousand nine hundred and five.

[Seal] F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit.

Allowed:

WM. B. GILBERT,
United States Circuit Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this 18th day of May, 1905.

JEREMIAH F. SULLIVAN,
MATTHEW I. SULLIVAN, and
THEODORE J. ROCHE,
Attorneys for Defendants in Error.

[Endorsed]: No. 1130. United States Circuit Court of Appeals, Ninth Circuit. Henry A. Crane, Plaintiff in Error, vs. Cornelius F. Buckley, Defendant in Error. Writ of Error. (Copy). Lodged for the within named Defendants in Error this 19th day of May, 1905. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

HENRY A. CRANE,
Plaintiff in Error,
vs.
CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,
Defendants in Error.
No. 1130.

Certificate of Clerk United States Circuit Court of Appeals to Proceedings, etc.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing thirty-five (35 pages), numbered from one (1) to thirty-five (35), inclusive, to be a true copy of the assignment of errors and of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit, including the opinion filed therein, and including the opinion filed in the case of Cornelius F. Buckley et al., Plaintiff in Error, vs. Henry A. Crane, Defendant in Error, No. 938 (which said latter opinion is incorporated in and made a part of the foregoing transcript of record, pursuant to order of court entered on May 18th, 1905), as the same remain of record in my office, and that the same in connection with the preceding certified copy of the printed transcript of record upon writ of error to the United States Circuit Court for the Northern District

of California, constitute the transcript of record in the above-entitled case upon return to the annexed writ of error.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 27th day of May, A. D. 1905.

[Seal] F. D. MONCKTON,
Clerk.

Writ of Error (Original).

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable Justices of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea, which is in the said Circuit Court of Appeals, before you or some of you, between the said Henry A. Crane, plaintiff in error, and Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins, defendants in error, a manifest error hath happened to the great damage of said plaintiff in error, as by his complaint appears. We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal distinctly and openly you send the record and proceedings, aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same in the Su-

preme Court at Washington, District of Columbia, on the 17th day of July, 1905, that the record and proceedings, aforesaid, being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 18th day of May, in the year of our Lord, one thousand nine hundred and five.

[Seal] F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit.

Allowed:

WM. B. GILBERT,
United States Circuit Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this 18th day of May, 1905.

JEREMIAH F. SULLIVAN,
MATTHEW I. SULLIVAN and
THEODORE J. ROCHE,
Attorneys for Defendant in Error.

Return to Writ of Error.

The answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

As within we are commanded, we certify under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things

touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

By the Court.

[Seal] F. D. MONCKTON,

Clerk United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 1130. United States Circuit Court of Appeals, Ninth Circuit. Henry A. Crane, Plaintiff in Error, vs. Cornelius F. Buckley, Defendant in Error. Writ of Error. Filed May 19, 1905. F. D. Monckton, Clerk.

Citation.

United States Circuit Court of Appeals, Ninth Circuit.

UNITED STATES OF AMERICA—ss.

The President of the United States, to Cornelius F. Buckley, Rudolph Spreckels and Timothy Hopkins, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington, District of Columbia, within sixty days from date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States Circuit Court of Appeals, for the Ninth Circuit, wherein Henry A. Crane is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judg-

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ment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WM. B. GILBERT, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 18th day of May, A. D. 1905.

WM. B. GILBERT,
United States Circuit Judge.

Service of the within citation, by copy, admitted this 18th day of May, 1905.

JEREMIAH F. SULLIVAN,
MATTHEW I. SULLIVAN and
THEODORE J. ROCHE,
Attorneys for Defendants in Error.

[Endorsed]: No. 1130. United States Circuit Court of Appeals, Ninth Circuit. Henry A. Crane, Plaintiff in Error, vs. Cornelius F. Buckley et al., Defendants in Error. Citation. Filed May 19, 1905. F. D. Monckton, Clerk.

FILE COPY.

FILED
MAR 24 1906

No. 58

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905

HENRY A. CRANE,

Plaintiff in Error,

vs.

CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS, and TIMOTHY HOPKINS,

Defendants in Error.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief of Plaintiff in Error.

WILLIAM GRANT and CHARLES S. CUSHING,
Attorneys for Plaintiff in Error,
104 Sutter Street, San Francisco, Cal.

THE JAMES H. BARRY CO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905

HENRY A. CRANE,
Plaintiff in Error,

vs.

CORNELIUS F. BUCKLEY,
RUDOLPH SPRECKELS, AND
TIMOTHY HOPKINS,
Defendants in Error.

No. 313.

BRIEF OF PLAINTIFF IN ERROR.

This is a writ of error prosecuted by plaintiff in error, Henry A. Crane, from a judgment made and entered in the Circuit Court of Appeals, Ninth Circuit, affirming the judgment entered against him in the United States Circuit Court, in and for the Northern District of California, upon the verdict of a jury, rendered in favor of defendants in error Cornelius F. Buckley, Rudolph Spreckels, and Timothy Hopkins, that plaintiff in error take nothing by said action. There is but one question presented for review by this Court and that arises out of the following facts:

STATEMENT OF FACTS.

On the 16th day of November, 1898, the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, made and entered its decree in a certain suit therein pending, wherein the plaintiff in error, Henry A. Crane, was complainant, and Cornelius F. Buckley, one of the defendants in error, was defendant, wherein it was adjudged and decreed that Henry A. Crane was the owner of certain real property in said decree described. It was further adjudged, in and by said decree, that all the rights, interests and claims of defendant Buckley, in and to said real property have been and are forever foreclosed and terminated, subject only to the equitable privilege granted to said Buckley that if he should pay said Crane at any time up to the first day of January, 1899, the unpaid portion of the purchase price of said real property, viz., sixty thousand ($60,000) dollars in United States gold coin, and interest thereon, in like gold coin, from the 18th day of March, 1894, at the rate of nine (9) per cent per annum until such payment is made and also pay certain taxes, etc., he, said Buckley, should be entitled to a conveyance from Crane of said land (Record, pp. 10-11). It was further provided in said decree that in case said Buckley failed to pay to said Crane the amounts aforesaid, on or before the first day of January, 1899, that said Buckley should

be removed and turned out of and from possession of said property (Record, p. 12).

On the 16th day of December, 1898, defendant Buckley moved for and obtained an order allowing him to appeal from the judgment hereinbefore referred to, to the Circuit Court of Appeals, Ninth Circuit, which order provided that, upon his giving a *supersedeas* bond in the sum of eight thousand ($8,000) dollars, proceedings should be stayed pending said appeal. Thereafter said Buckley as principal, and defendants in error, Spreckels and Hopkins, as sureties, filed in said Court a bond, which is the subject matter of this suit (Record, pp. 2-3).

The bond referred to is set forth in the record, pages 14-15, and contains the following recitals:

"Whereas, the said respondent and cross-complain-
" ant is desirous of staying the execution of the said
" judgment so appealed from, in so far as it relates to
" the possession of the land and premises involved
" therein, and is desirous of staying the execution of
" said judgment or decree so appealed from, in so far
" as it relates to the costs awarded to complainant
" therein, Now, the condition of the above obligation
" is such, that if the said C. F. Buckley shall prose-
" cute his appeal to effect, and shall answer all dam-
" ages and costs that have been and shall be awarded
" against him if he fails to make his appeal good, and
" if he shall answer all damages that shall accrue to

" the said respondent by reason of the value of the use " and occupation of the lands and premises from the " time of said appeal until the delivery of possession " thereof to said Henry A. Crane, and for all waste " committed thereon, then the above obligation to be " void, else to remain in full force and effect."

The appeal in that case was duly heard in the Circuit Court of Appeals and the judgment appealed from was affirmed on October 2, 1899. The opinion rendered on that appeal is set forth in the record (pp. 66-67).

On October 17, 1899, the appellant, Buckley, filed a petition, which is designated a petition for the rehearing, in which petition he did not, in effect, ask for a rehearing of the case at all.

The fact that no rehearing, in the ordinary sense of the term, was asked for, appears by the opinions rendered by the Circuit Court of Appeals in passing on the original appeal and on the so-called petition for a rehearing. It appears by the opinion of the Circuit Court of Appeals (Record, pp. 66-67), that defendant Buckley was in possession of certain lands under a contract for sale thereof; that plaintiff Crane commenced an action against him to forfeit his rights therein; that Buckley filed an answer and cross bill alleging that the execution of the agreement of sale entered into by him was induced, on his part, solely by false and fraudulent statements and misreprsent-

ations made to him by plaintiff Crane and others. The case was tried on a very voluminous record (Record, p. 67) in the lower Court and resulted in a judgment that the evidence did not sustain the charges of fraud (Record, p. 67). By the original judgment against him in the lower Court, Buckley was allowed until the first day of January, 1899, within which to make payments required by the decree. In his petition for a rehearing he did not ask for a rehearing of the case on its merits, but asked "for "such a modification of the judgment as will allow "the appellant until the first day of November, 1899, "within which to make the payments required by the "decree from which the appeal was taken." (Record, p. 68.) He did not ask that a single feature of the judgment against him be reversed, but he asked for an extension of time "within which to make the payments required by the decree."

It will be noted that Buckley had forty-five days from the time of entry of the decree within which to redeem. This time expired before the appeal was determined, and in his petition for a rehearing he asked for a privilege which he had prior to his appeal, and which was only lost to him by reason of his appeal.

On October 18, 1899, the Circuit Court of Appeals filed its opinion on said petition for rehearing (Record, pp. 68-69), wherein the action is summed up in the following language:

"Under the circumstances appearing in the record, " this Court is of the opinion that it is equitable and " just to allow the appellant until the 1st day of No- " vember, 1899, within which to make the payments " required by the decree from which the appeal is " taken, and, accordingly, it is ordered that the judg- " ment of this Court entered herein on the 2d day of " October, 1899, be, and hereby is, so modified as to " read: Cause remanded to the Court below with di- " rections to substitute for the first day of January, " 1899, the first day of November, 1899, within " which the payments therein provided for are per- " mitted to be made, and, as so modified, the decree is " affirmed.

"The petition for a rehearing of the cause is de- " nied."

A mandate duly issued from the Circuit Court of Appeals to the lower Court on that appeal and is set forth in the record (pp. 70-71). This mandate follows the language of the opinion on petition for the rehearing and concludes as follows: "and as so modified the decree is affirmed with costs." This mandate, which was filed in the lower Court on October 23, 1899, contains a memorandum of the amount of costs taxed against said Buckley. Mr. Buckley, the defendant in that case and defendant in error here, had until the first day of November, 1899, within which to avail himself of the privilege granted to him by the upper Court of paying for the land. He

made no attempt to do anything of the kind and never paid nor tendered any money to Mr. Crane (Record, p. 77). It is perfectly evident that Mr. Buckley never had any intention of paying for the land when he filed his so-called petition for a rehearing. The Court allowed him eleven days in which to make the payments required by the decree. Yet Mr. Roche, one of the attorneys who filed the petition for a rehearing, notified plaintiff before the expiration of the time for redemption (the aforesaid eleven days), that Buckley did not intend to pay to Mr. Crane the amount found due by the lower Court (Record, p. 105), and Mr. Buckley testified: "The law firm of Sullivan & Sullivan, "including Mr. Roche, instructed me that it "was desirable to give up the land by the "first of the month or before the first (that is before "the expiration of the eleven days) and accordingly "I wrote to my man down there to give it up." (Record, p. 107.) Plaintiff in error Crane was restored to possession of the premises on November 4, 1899 (Record, pp. 85-86). Mr. Buckley occupied and used the premises by virtue of the bond in suit from January 1st to November 4th, 1899, and improved his opportunity of remaining in possession by committing waste thereon by practically tearing up, severing and removing everything from said premises. This appears by the offers made by plaintiff in error

on the trial of the present action in the lower Court (Record, pp. 82-83). After the mandate had gone down in the case in which the appeal had been prosecuted by Mr. Buckley, as hereinbefore referred to, the United States Circuit Court, in and for the Southern District of California, being the Court from which the appeal was taken, made and entered a decree modifying its former decree, which modifying decree is set forth in the record herein (p. 73), and contains the following language:

"It is hereby ordered, adjudged and decreed that " the former decree of this Court, made and entered " herein on the 16th day of November, 1898, be and " the same is hereby modified by substituting for the " words and figures 'first (1st) day of January, one " 'thousand eight hundred and ninety-nine' where " the same occur, on pages 4, 5 and 6 of said former " decree, the words and figures 'first (1st) day of " 'November, 1899.' "

This modified decree does not and could not affect the rights of the parties in this action now pending, as the question, as to whether Buckley had made his appeal good, must be determined by the action of the Appellate Court on said appeal.

Thereafter, on January 8, 1900, plaintiff in error here, Mr. Crane, commenced this action, now pending, against the defendant in error Buckley as principal and the other defendants as sureties on the aforesaid bond. In order to assist this Court in con-

sidering this case, we shall give a brief history of the present case since that time. The action was brought on for trial in the Circuit Court of the United States, in and for the Northern District of California, in August, 1902, and resulted in a verdict in favor of the plaintiff in the sum of five thousand ($5,000) dollars (Record, p. 44). Thereafter, defendants, also defendants in error here, prosecuted a writ of error to the Circuit Court of Appeals from said judgment in favor of said Crane, and said Court reversed the judgment and remanded the cause for a new trial (Record, pp. 51-52). The decision of the Circuit Court of Appeals is set forth in 123 Federal Reporter, 29, and it is also set forth in the record herein (pp. 165 *et seq.*).

In his opinion, the Honorable Judge Ross, in deciding the case, held that the extension, within which Buckley was allowed to make payment under the contract, until November 1st, 1899, had kept in force the provision of the agreement giving Buckley the right of possession until November 1st, 1899. (123 Federal Reporter, 29; Record, p. 173.) This disposed of the question as to the use and occupation of the premises, as far as that Court was concerned, but, we regret to say, the opinion is not altogether clear on the proposition as to the liability of the principal and sureties for the waste. The decision of that Court in reference thereto contains the following language:

"We do not understand the learned counsel for " plaintiffs in error to deny that for the waste and for " the value of the use and occupation of the premises " by Buckley after the expiration of the time fixed " by the modified decree within which he was al- " lowed to complete the payment for the property, " the plaintiffs in error are liable; but he insists that " for the use and occupation of the premises by Buck- " ley up to the expiration of that time, neither he nor " his sureties are responsible on the bond."

When this case came on for trial in the Circuit Court, for the second time, the meaning of the aforesaid opinion became a matter of some controversy as to whether the Circuit Court of Appeals intended to hold that Mr. Crane could not recover, at all, for either the use and occupation or for waste committed prior to November 1st, 1899, or whether he could recover for the waste and not for the value of the use and occupation. The lower Court ruled that he was entitled to recover for neither, as will be seen by the rulings hereinafter referred to. The Court, on the objection of defendants in the action, defendants in error here, excluded all evidence as to any damage prior to November 1st, 1899. This was in effect holding that the plaintiff in the case, plaintiff in error here, could not recover on the bond, at all, as, in any event, only three days elapsed between the first of November and the time when Mr. Crane got possession of the premises, November 4th, 1899 (Record,

p. 85). The defendants in the action filed an amendment to their answer setting up delivery of possession by Buckley on October 31st, 1899 (Record, pp. 53-54), and the jury found in their favor on such issue by returning a verdict in favor of defendants (Record, p. 55).

From the verdict, and judgment entered thereon, plaintiff in error Crane prosecuted a writ of error to the Circuit Court of Appeals. That Court affirmed the judgment of the lower Court upon the authority of the decision of Judge Ross, hereinbefore referred to. The opinion of the Court, on the second writ of error is set forth in the record (pp. 162-163). It tersely states the only point involved in the case to be, "Did "the defendant Buckley prosecute his appeal to ef-"fect?"

Upon entry of judgment, plaintiff in error, Crane, brought the case to this Court, and the only question involved on this writ of error is the correctness of the ruling of the Circuit Court of Appeals in holding that Buckley prosecuted his appeal to effect in the action in which the bond was given.

Many rulings were made by the lower Court on the trial from which the present writ is prosecuted, excluding evidence and giving instructions, and we shall only refer to two or three of these, as they all present the same point, and it would subserve no useful purpose to encumber the record by useless repetition of the errors assigned.

SPECIFICATIONS OF ERRORS RELIED ON BY PLAINTIFF IN ERROR.

When the plaintiff in error, Mr. Crane, was on the witness stand he was asked the following question:

"Q. State, Mr. Crane, what was the value of the "use and occupancy of that land from the 3d day of "January, 1899, to the 4th day of November, 1899."

The objection to this question was sustained in so far as it covered the period between the 3d day of January and the 1st day of November, 1899 (Exception No. 3; Record, pp. 77-78). This same ruling was, in effect, repeated many times while this and other witnesses were on the stand. (Exception No. 4, p. 78; Exceptions 8-9, p. 92.)

Further efforts were made by plaintiff Crane to prove the waste committed by defendant Buckley. We shall refer only to a single one of these, as it presents the point fully and the competency of the plaintiff to make the proof was conceded (Record, p. 81):

"Mr. CUSHING: We offered to prove by the wit- "ness, Mr. Henry A. Crane, that the defendant, Cor- "nelius F. Buckley, caused and committed waste up- "on and of said real property described in said judg- "ment and decree, a copy of which is annexed to and "make a part of the complaint on file herein and is "marked Exhibit 'A', between the 3d day of January, "A. D. 1899, and the first day of November, A. D.

" 1899, to the extent of and in the amount of over " $2,500."

The lower Court sustained the objection of defendants to these offers (Exception No. 6, pp. 82 and 83). The rulings hereinbefore referred to excluded all evidence upon which any verdict could be found in favor of plaintiff for any matters occurring prior to November 1st, 1899.

The Court instructed the jury as follows:

"Under the law of this case, the plaintiff is not en- " titled to recover, either for use or occupation, or for " waste, prior to the first day of November, 1899, un- " der the terms of the modified decree.

"That leaves the only questions for you to " determine, first, as to whether or not Buck- " ley vacated those premises on or before " the first day of November, 1899, and, " if he did not, then the value of the use and occupa- " tion for the remainder of the time, from the first " day of November until the fourth day of Novem- " ber.")Record, pp. 115-116; Assignment of Errors, 32-33; Record, p. 130.)

The foregoing rulings, together with many others covering the same point, have been duly assigned as errors, and we shall not refer to these matters more fully at this time, as there can be no controversy as to the point to be considered upon this appeal.

As the foregoing fully presents the one point in the case, we shall proceed with our argument.

ARGUMENT.

There is but one question before the Court, and that is: Did defendant Buckley prosecute his appeal to effect, and make his appeal good, in the action in which the bond was given? If he did, the judgment herein should be affirmed, but, if the Court determines, as we earnestly contend, that he failed to prosecute his appeal to effect, then the judgment herein should be reversed.

While the somewhat extended statement hereinbefore set out was necessary to give a full history of the controversy before the Court, the facts upon which the question involved depends can be stated very briefly, and we herewith give a very short statement of the same so that they may be readily comprehended by the Court.

RESUME OF FACTS.

Nov. 16, 1898—Judgment rendered in United States Circuit Court in action *Crane* vs. *Buckley,* requiring Buckley to make certain payments or vacate premises Jan. 1st, 1899.

Dec. 16, 1898—Buckley appeals and files bond in suit conditioned that he will *"prosecute his appeal to effect."*

Oct. 2, 1899—Judgment wholly affirmed in Circuit Court of Appeals.

Oct. 17, 1899—Buckley files petition for rehearing,

in which he abandons any effort to obtain reversal on the merits, but asks for a modification of the decree, so as to allow him till November 1, 1899, within which to make the payments required by the decree.

Oct. 18, 1899—Court of Appeals modifies judgment by allowing Buckley till "Nov. 1, 1899, within "which payments provided for in decree are per-"mitted to be made" and affirms judgment as modified with costs and denies rehearing.

Prior to Nov. 1, 1899—Buckley's attorneys advise him to remove from possession and not to redeem and notify plaintiff of such intention.

Oct. 30, 1899—Buckley removes from possession.

THE SOLE QUESTION IN THIS CASE IS, DID BUCKLEY PROSECUTE HIS APPEAL TO EFFECT?

The bond, on which this action is brought, was conditioned that he should be liable if he failed to make his appeal good, or if he failed to prosecute it to effect. See Bond (Record, p. 15).

That Buckley failed to make his appeal good, seems to us to be so evident as hardly to merit discussion. Before proceeding to cite any authorities, we desire to discuss the question from the standpoint of plain common sense.

It will be noted that the judgment declared that all the rights of Buckley have been and are foreclosed and that the equitable privilege of paying for

the land was extended to him for a certain time (Record, pp. 10 and 11). From this judgment an appeal was taken and the bond in suit was given to stay execution. On Oct. 3, 1899, the Circuit Court of Appeals rendered an opinion affirming the judgment. Up to this time, then, there is no question but that Buckley failed to make good his appeal.

A petition for a rehearing was then filed, in which Buckley asked for an act of grace and the Court accorded him until the first day of November, 1899, "within which payments therein provided for are permitted to be made"; and the Court added, "The petition for a rehearing of the case is denied." (Record, pp. 68-69.)

The common sense equivalent of making good an appeal is to reverse the judgment. There is no pretense here that the judgment was reversed. The opinion says it is affirmed. That this is the correct interpretation of the action of the Court, appears by the mandate wherein costs are taxed against appellant Buckley and in favor of respondent Crane (Record, p. 71).

This was done under rule 31 of the Circuit Court of Appeals, which we believe is common to all the Circuit Courts of Appeal, which provides that in case of affirmance, costs shall be allowed to defendant in error, or appellee.

The main fact determined by the judgment appealed from, was that Crane was the owner of the

land. The point in which a modification was sought was merely the incident, the equitable privilege, as the judgment called it. The modification only extended the time within which Buckley could pay for the land.

Buckley made no attempt, and had no intention of paying for the land. If he did so, he would have been obliged to pay the sum of $4,950 interest from Jan. 1, to Nov. 1, 1899, upon the amount due to Crane on the judgment, said judgment being for the exact amount due on the agreement upon which the judgment is based. Buckley remained in possession, but did not pay for the land, and having failed to do so, he now says, that by reason of this act of grace, accorded to him by a Court of Equity, he can remain in possession, use the property and commit waste thereon, and at the same time neither pay the amount due under the judgment on the one hand, nor the value of the use and occupation, on the other.

If this *supersedeas* bond had not been given on January 4, 1899, Crane would then have been placed in the possession of his property. By virtue of this bond, Crane was kept out of the occupation of his property, and Buckley was permitted to enjoy the same until November 4, 1899.

We submit, without citing any authority, that it is apparent that Buckley failed utterly to prosecute his appeal to effect, and that the privilege accorded to him constituted no reversal of the judgment. The

extension of time merely affected an incident to the judgment and the Court awarded him this as an act of grace, and he, having failed to act under it, can not claim to be relieved from the liability on the bond.

AUTHORITIES.

The bond under consideration is given under Section 1000 of the Revised Statutes, and as stated by the United States Supreme Court in *Hotel Co.* vs. *Kountze,* 107 U. S., 378 (27 Lr. Ed., 616), "is a for-" mal instrument required by the law, and governed " by the law, and has, by nearly a century's use be-" come a formula in legal proceedings, with a fixed " and definite meaning."

The affirmance of the judgment by the upper Court conclusively establishes the liability of the appellant on the bond.

Davis vs. *Patrick,* 57 Fed., 909.
Babbit vs. *Shields,* 101 U. S., 7 (25 Lr. Ed., 820).

The only question to consider is, was the judgment of the lower Court affirmed? In the case now under consideration the learned judge, who first tried the case in the lower Court, Judge Beatty, of the United States District Court of Idaho, after consideration, determined that the judgment had been affirmed and

instructed the jury accordingly. This ruling has been reversed by the Circuit Court of Appeals, but we respectfully submit that the ruling of the lower Court was the correct one.

The terms "prosecute his appeal to effect" and "fails to make his appeal good" are both used in the bond under consideration (Record, p. 15).

It is evident by glancing at the bond that these two terms are used to express the same thing. Without referring to any authority, it would seem that there could not ordinarily be much doubt as to what "making an appeal good" means. It certainly means that the appellant must reverse the case.

Let us look for a moment at a few authorities as to the meaning of the term, "prosecute to effect." This provision means "prosecute with success."

Am. & E. E. L., 2d ed., Vol. 10, p. 445.
Perreau vs. *Bevan*, 5 B. & C., 284.
Gould vs. *Warner*, 3 Wend., N. Y., 54.
Karthaus vs. *Owings*, 6 H. & J. (Md.), 138.

The construction placed upon this phrase, "prosecute with effect," by the bulk of authorities, is that the suit shall be prosecuted successfully to a final judgment.

Note to 38 Am. St. Rep., 706.
Wood vs. *Thomas*, 5 Blackford, 553.
Trent vs. *Rhomberg*, 66 Tex., 253.

Where the judgment is affirmed wholly as to the right of recovery, and partially as to the amount, or as to certain of the defendants, the sureties are still liable on their bond.

See note, 38 Am. St. Rep., p. 709.

The *rationale* of these decisions as to sureties is thus explained in *Seacord* vs. *Morgan,* 3 Keyes, 636, as follows: "If the case is within the letter of their "contract, they are liable, unless there is something "in the spirit or intention of the instrument, or of the "law under which it is taken, which exonerates them. "The object of the undertaking is to procure an ab- "solute stay of execution and of all proceedings on "the judgment, and such is its effect. The motive of "requiring the undertaking was to secure to the "plaintiff the fruits of the recovery, in case it should "be determined that the allegations of error were "unfounded. As the plaintiff is, by the stay of exe- "cution, deprived of the immediate resort to the "property of the judgment debtor which the "law would otherwise give him, and as his "title, to the amount adjudged in his favor, "is *prima facie* established, it was the policy "of the law that he should have security to "indemnify him against the possible contingency "of the delay. The law assumes the judgment to be "such presumptive evidence of his right that it will

"not subject him to the hazard arising from the de-
"lay of further litigation, without an indemnity
"against any loss which he might thereby incur. *If*
"it should be decided that, in order to hold the
"sureties, the judgment should be affirmed in all its
"parts without variation or modification, the provi-
"sions for security would be illusory in a great
"variety of cases which may be supposed." (Same note.)

The learned author of the American State Reports concludes the paragraph of the note from which the above citation is taken as follows: "If the bond "covers the whole judgment, only the most technical "reasons can be adduced for the theory that the form "in which that judgment is rendered should have "any material effect upon the ultimate liability of "the sureties."

In *Butt* vs. *Stinger,* 4 Cranch, C. C., 252, Circuit Court, District of Columbia, an appeal bond was given conditioned that the appellant should prosecute his appeal with effect. The judgment was reversed, and the Court proceeded to give a new judgment for a less sum, which it was held the lower Court should have given. In the action on the bond the Court held that, although the judgment had been ordered reversed, still it was to be considered as affirmed, in part, *and the appeal was not prosecuted with effect.*

The case is summed up in the syllabus as follows:

"The condition of an appeal bond is broken unless the judgment is reversed in toto."

This case, *Butt* vs. *Stinger,* was cited with approval in *Hopkins* vs. *Orr,* 124 U. S., 510 (31 Lr. Ed., 525). In the latter case, it was claimed that a judgment was not affirmed because the Appellate Court remitted part of the interest. The United States Supreme Court held that the judgment was affirmed within the meaning of the Territorial Statutes and of the appeal bond and cited the above case (4 Cranch, C. C., 252) to sustain this doctrine. This sustains the extreme position, that an appeal is not prosecuted to effect unless the judgment is reversed *in toto.*

In *Gay* vs. *Parpart,* 101 U. S., 391 (26 Lr. Ed., 841), this Court by Waite, Chief Justice, said: "If, "on the final disposition of the writ of error or ap- "peal, the judgment or decree brought under re- "view is not substantially reversed, it is affirmed and "the writ of error or appeal has not been prosecuted "with effect."

THE CIRCUIT COURT OF APPEALS HAS, WE RESPECTFULLY SUBMIT, ERRONEOUSLY HELD THAT BUCKLEY PROSECUTED HIS APPEAL TO EFFECT, AND IN SO DECIDING HAS NULLIFIED THE OBLIGATIONS CREATED BY THE BOND, BY MEANS OF WHICH ALONE BUCKLEY WAS ENABLED TO KEEP POSSESSION OF THE PROPERTY AFTER JANUARY 1, 1899.

This is an action upon contract. The plaintiffs in

error promised to pay to defendant in error the value of the use and occupation of the premises, provided the appeal was not prosecuted to effect.

It is claimed the modification of the judgment constitutes a prosecution of the appeal to effect, and that defendants in error are therefore released from liability. The condition in the bond, "that if the said "C. F. Buckley shall prosecute his appeal to effect "* * * then the above obligation to be void, else "to remain in full force and effect," is a common form of obligation. This provision, inserted in all such bonds, is simply a statement, which would be implied by law, that if the contract is without consideration, then the same cannot be enforced.

This condition, therefore, is one which the law itself would imply, that if the rights obtained by the bond are rights which the appellate Court determines exist in favor of the obligors, then no consideration exists for the giving of the bond and there is no liability.

It is most important to a proper understanding of this case that the reason underlying the condition in the bond should be thoroughly appreciated. It is submitted that the defense interposed is simply that no consideration exists for the obligation, and hence the same can not be enforced.

Therefore the question to be determined is: When the Court modified the judgment, did the Court determine that Buckley was properly entitled to the

possession of the premises during the time of the appeal, and hence there was no consideration for the giving of the bond?

It is submitted that the decision of the lower Court, which we ask to have reviewed, necessarily assumes that the judgment of the Court, in the foreclosure action, allowing Buckley forty-five days to make payment, was erroneous, and that the judgment should have allowed him till November 1, 1899, within which to make payment. If this assumption is not true, then it follows that Buckley was in possession by virtue of the bond, and hence a consideration exists and a liability follows.

In discussing this point the attention of the Court is invited only to a small part of the decision of the Circuit Court of Appeals near the end, which is the conclusion drawn from the facts, in the following words:

"We are of the opinion that the defendant in error " was no more entitled to recover the value of the use " and occupation of the premises in question during " the enlarged time finally granted Buckley within " which to make good his covenants, than for the " period of grace first fixed by the trial Court, in re- " spect of which the defendant in error asserts no " right even in his complaint." (Record, p. 173.)

We are pleased that the vital part of the decision of the Circuit Court of Appeals is so concise that it can be all under the eye of the Court, for the application thereto of the following observations.

This action is upon the *supersedeas bond,* and no action could be based on the bond against the parties thereto for the period fixed by the trial Court, as that period had expired *before* the bond was given, and it is needless to say the bond was not given to cover any part of that period. The learned judge who wrote the opinion would not have thought it strange that we did not claim relief for what he calls "the period of grace fixed by the trial Court," if he had considered the fact that that period had expired before the bond in suit was given.

If what is called the enlarged time is intended to mean the time from January 3d to November 1st, 1899, then the Circuit Court of Appeals has overlooked the fact that if the *supersedeas* bond had not been given on January 3d, 1899, Crane would then have been put into the possession of the property; and the making of the order by this Court on October 19th, 1899, for the enlarged time to Buckley within which to make good his covenants would not, of itself, furnish any reason for removing Crane from, or restoring Buckley to, the possession of the property. It is the making the payments under that order that would enable Buckley to regain the possession of the property, but, as no payment was made, Buckley is liable on his *supersedeas* bond, exactly as he would be if no privilege of payment had been asked for by, or awarded to, Buckley.

The leading question here is: What were the obli-

gations created between defendant in error Buckley and plaintiff in error Crane by means of the *supersedeas* bond sued on? The answer to this question, followed to its consequences, will solve our case.

This case is one of a common class.

Crane sold and Buckley purchased, certain real property on credit. Buckley was let into the possession of the property at the time of purchase, and he refused subsequently to pay the deferred purchase price. Crane foreclosed the contract of purchase and all interest of Buckley in the property. The trial Court, in its decree of foreclosure, recognized Buckley as being in the possession of the property, and as having paid a part of the purchase price to Crane; and recognized Crane as the owner of the property and as being entitled to the immediate possession thereof. The decree of foreclosure was made on November 16th, 1898; and by the decree, the Court gave to Buckley the "equitable privilege" of paying to Crane all that was owing him under the contract of purchase up to the time of payment, and the costs of suit within forty-five (45) days from the entry of the decree, viz., on or before January 1st, 1899, in default of which payment all Buckley's rights were terminated. This decree is in the usual form adopted on foreclosure of executory contracts for failure to pay the purchase price, with purchaser in possession of the property. Buckley did not avail himself of the

equitable privilege given him of paying for the property on or before January 1st, 1899; but he still retained the possession thereof.

In this condition, on January 3d, 1899, the legal and actual rights of the parties were as follows:

Buckley had a right to appeal to the Circuit Court of Appeals and a right to give to Crane his choice of two bonds, *i. e.,* a cost bond, or, a *supersedeas* bond; and in case he appealed and gave the cost bond only, he had a right to have his appeal heard, by said Court, and in the same manner as he would by giving the *supersedeas* bond. By Buckley giving the cost bond only, Crane would have a right to the immediate possession of the property on January 3d, 1899, and afterwards, pending the appeal. By giving the *supersedeas* bond, Buckley secured the right on January 3d, 1899, to continue in and hold the possession of the property pending his appeal.

U. S. Rev. Stats., Sec. 1000.

Buckley gave the *supersedeas* bond, and not the cost bond; and thereby, and solely by virtue thereof, he kept himself in the possession of the property pending his appeal.

It gave Buckley a stay of execution of the judgment pending his appeal; and during that stay he got the privilege of making the payment; but he did not make it.

If Buckley had given the cost bond only, and Crane

was put in the possession of the property on January 3d, 1899, and pending Buckley's appeal, and Buckley had obtained on October 19th, 1899, as he did, the privilege of paying for the property on or before November 1st, 1899, and had failed to make such payment, as he has done, Buckley could not make claim against Crane for the value of the possession of the property, and he could not make claim for any relief whatever without making payment or tender of payment. And having thus secured by means of the *supersedeas* bond that which belonged to Crane, viz., possession of the property from January 3d to November 4th, 1899, why should not that bond be responsible to Crane for the things of which he was deprived by virtue thereof? It is a well known principle of law that if one party is dispossessed by another, through legal proceedings, and the party dispossessed finally establishes his title, the dispossessor is liable for damages. In the present case, if Buckley had appealed and at the same time surrendered possession and had then obtained exactly the same extension which he did obtain here, and had not exercised the same, could it be for a moment contended that Crane would be liable to Buckley? If Crane would not be liable in that case, then Buckley must be liable in this.

Upon making the decree of foreclosure on November 16th, 1898, the trial Court gave Buckley to January 1st, 1899, to make the payments due to

Crane, etc. When the Circuit Court of Appeals, after affirming the judgment of the lower Court, and at request of Buckley, allowed him twelve (12) days, from October 19th, to November 1st, 1899, to make payment to Crane, it is respectfully submitted that said Court did not mean or intend by the privilege thus given on Buckley's petition, that the lower Court should have given him eleven (11) months and fourteen (14) days instead of forty-five (45) days when making the decree of foreclosure, that is: from November 16, 1898, to November 1, 1899. The upper Court did not mean or intend that the lower Court should have granted such a long time to Buckley within which to pay Crane, should he elect to do so, without security to Crane for the possession of the property, in case Buckley should fail to make the payment. Such a length of time, without such security, would be ureasonable and an injustice to Crane.

The mode by which the upper Court saw fit to have the privilege of payment to Crane for twelve (12) days, or to November 1, 1899, entered of record, that is by having the dates in the decree of the lower Court altered to that effect, was not intended to mean that the lower Court erred in not having named in its decree, November 1st, 1899, instead of January 1st, 1899, as the limit for Buckley's privilege of payment.

The meaning of the upper Court must have been, in justice to Crane as well as to Buckley, as if the Court had spoken thus:

"You, Buckley, have taken your appeal and have "kept yourself in the possession of the property pending your appeal by means of a *supersedeas* bond "given by you to Crane in the sum of $8,000 to make "good to him the value of the use and occupation of "the property which Crane himself would have had "pending your appeal, if you had not given that "bond. There is no reason appearing to disturb the "judgment of the lower Court, and so it is affirmed. "You, however, ask for twelve (12) days, viz., until "November 1st, 1899, within which to pay Crane the "purchase price, as provided in the decree of foreclosure. Now, you are awarded that privilege; but, "if you do not avail yourself of it, your liability to "Crane for the possession of his property, under the "*supersedeas* bond, pending your appeal, shall not "be altered or impaired by reason of giving you the "privilege you have asked for, and your failure to "avail yourself of the privilege of paying Crane the "amount due, together with interest, within the "twelve (12) days asked by you and allowed you by "the Court, shall leave you in the same relations with "and under the same obligations to Crane as if you "had not asked for or obtained that privilege. But, "if you pay Crane in full as provided in the decree "of foreclosure, including interest, within the twelve "(12) days, your relations with and obligations to "Crane shall thereby be changed accordingly, so that "you will own the property and Crane the money."

We submit another observation which also elucidates our argument.

The Circuit Court of Appeals has been but recently established, and, so far, the causes coming before it are being reached speedily; but the *law* for the decisions of that Court is drawn from the same fountains as the law for the decision of the United States Supreme Court after, perhaps, four years of unavoidable delay. Let it then be assumed that Buckley's appeal in this case had been taken to the United States Supreme Court instead of to the Circuit Court of Appeals, and that he had given his *supersedeas* bond for four (4) years' use and occupation of the property, say $32,000, instead of for one (1) year, $8,000, as done here; and let us assume that at the end of four (4) years the judgment appealed from was affirmed, and on petition for rehearing, at Buckley's request, he was granted the same privilege of twelve (12) days, and entered in the same way in the original decree as he was given by the Circuit Court of Appeals to make the payments, etc., and that he then failed to make any payment, as he had done here; is it possible that such privilege, *unaccepted,* and after that length of time, should be construed as the order of the Circuit Court of Appeals has been construed in the decision rendered herein, thereby giving Buckley the use and occupation of the property four (4) years free of charge and at the same time cancelling the bond given to secure the same? We say with earnestness, and

with the certainty of common sense, that it should not.

Either in the case of the appeal to the Circuit Court of Appeals or in the case of an appeal to the United States Supreme Court, if the cause at bar had arisen before the Circuit Court of Appeals was established, and whether it took ten months to get a decision from that Court or took four years to get a decision from this Court, the giving of the twelve days on request of Buckley under the name of petition for rehearing, to make payments to Crane, is subject to only one construction, *i. e.,* it was a *privilege* to Buckley, but not as an injury to Crane, and an injury contingent in extent to the length of time the appeal should be pending.

Under the decision rendered here, although Buckley had given Crane a *supersedeas* bond as security for the value of the use and occupation of the property pending his appeal, and the judgment was affirmed, yet Crane is deprived of the use and occupation of the property pending the appeal by reason of the *supersedeas* bond, and also deprived of the security given him by the bond.

It is easy to see that when the Court of Appeals granted Buckley twelve days' time within which to make payment of the amount due to Crane, it did not intend to hold that the Court below should have granted Buckley to November 1st, 1899, in the first place. If the case had been decided by the Court of Appeals on December 31st, 1899, instead of on Oc-

tober 19th, 1899, it certainly would not have modified the judgment of the Court below by changing the words January 1st, 1899, to read November 1st, 1899; but, if it granted Buckley a similar extension to that granted here, it would have changed the date to January 12th, 1900. The correctness of the judgment of the lower Court can not depend upon the date on which the case is decided on appeal. It clearly follows that the extension of the time within which Buckley might pay Crane was an act of grace on the part of the appellate Court and not because of any error in the judgment of the Court below.

BY ITS DECISION THE CIRCUIT COURT OF APPEALS HAS ENABLED BUCKLEY TO USE THE PRIVILEGE GRANTED TO HIM OF PAYING FOR THE LAND, FOR A PURPOSE FOREIGN TO THE INTENTION OF THE COURT, VIZ.: OF REMAINING IN POSSESSION AND NOT PAYING FOR THE LAND, WHILE AT THE SAME TIME HE TOOK ADVANTAGE OF THE GRACE EXTENDED TO HIM BY WASTING THE PROPERTY OF PLAINTIFF IN ERROR.

In urging upon this Court our claim that the Circuit Court of Appeals has erred in holding that Buckley has "prosecuted his appeal to effect," we desire to present briefly to the Court our reasons for claiming that the effect of that decision is to render nugatory the important provisions of the revised statutes regarding *supersedeas* bonds.

It is not claimed that Buckley remained in possession other than by the terms of this bond. On October 2, 1899, the Circuit Court of Appeals by its opinion affirmed the judgment without qualification. On the appeal it was nowhere contended that the original time allowed for redemption was too short. On the other hand, the petition for a rehearing did not ask for a single particle of relief, which had been contended for on the appeal itself.

In the language of the Court itself, in its order on the petition for a rehearing, the cause was "remanded " to the Court below with directions to substitute for " the first day of January, 1899, the first day of No- " vember, 1899, within which the payments therein " provided for are permitted to be made, and, as so " modified, the decree is affirmed." It is needless to say that Buckley made no attempt to pay the money, and it needs no stretch of the imagination to conclude that he never intended so to do.

Upon the commencement of the present action it was immediately claimed that, by reason of that privilege granted to Buckley, he had prosecuted his appeal to effect, and consequently was not liable on the bond (Answer, Record, pp. 36 to 40). This claim is sustained by the Circuit Court of Appeals in its opinion, we respectfully submit, erroneously.

The provisions of the Revised Statutes whereby a party, desirous of appealing, is required to give a bond on appeal to prevent the carrying of the judg-

ment of a lower Court into effect, are intended to secure to the respondent the fruits of his judgmnt.

In this case, by virtue of the bond, Buckley withheld possession of this property for practically a year. By the judgment of the lower Court, Crane was entitled to possession on January 1st, 1899. The bond given was to protect Crane's rights established by this decree. The Circuit Court of Appeals affirmed the judgment, with the modification hereinbefore referred to, and adjudged costs in his favor. That Court now holds that Buckley, by reason of the act of grace granted to him, of which he never availed himself, prosecuted his appeal to effect, and that therefore the bond is no protection to Crane. Yet, at the same time, Buckley did in fact remain in possession of the land by virtue of this very bond, and during that time wasted and destroyed the property of defendant in error by tearing up and removing an engine, boiler, machinery, creamery outfit, ice machine, seven pumps, three windmills, two horse powers, and other property. This property was removed by Buckley during the life of the bond (Record, p. 94). Instead of operating as a protection to Crane, the bond has operated as a detriment to him of the most pronounced character.

If Crane had been given possession according to the original judgment, he would have then received his property on January 1st, 1899, with all fixtures and appurtenances in place thereon. Buckley, how-

ever, availed himself of the privilege of giving the bond expressly provided by statute to protect Crane. Buckley appeals and the judgment against him is affirmed with costs, and he is not accorded a single measure of relief which he did not have before giving the bond or taking the appeal. He is enabled by this bond to retain the full use of the property for a year, and to appropriate everything movable thereon to his own use without any liability on his part or that of his sureties to Crane.

The advantage to Crane from this beneficent institution of stay bond is hardly apparent. This judgment is affirmed, but he loses a year's rental of his ranch and everything movable thereon, and does not even get a cause of action against the sureties.

THE REFUSAL OF BUCKLEY TO ACCEPT THE PRIVILEGE GRANTED TO HIM, LEFT HIM IN EXACTLY THE SAME POSITION IN WHICH HE WAS PRIOR TO THE FILING OF HIS SO-CALLED PETITION FOR A RE-HEARING, AND HE CANNOT CLAIM ANY RIGHTS UNDER THE ORDER GRANTING HIM PERMISSION TO MAKE THE PAYMENTS.

We have seen that the judgment appealed from was wholly affirmed in October 2, 1899 (Record, p. 67). The opinion shows that Buckley was contending on the appeal that the issue of fraud, tendered by him, was well taken (Record, p. 67). He then filed his petition, in which he abandoned all effort to sustain

this defense, but in the language of the Court, he prayed "for such a modification thereof as will allow "the appellant until the first day of November, 1899, "within which to make the payments required by "the decree, from which the appeal was taken." (Record, p. 68.)

The order on this petition granted to him the period of eleven days "within which the payments therein provided for are permitted to be made." (Record, p. 69.)

As hereinbefore shown, Buckley not only made no attempt to redeem, but within the very period of eleven days granted to him by the Court, in furtherance of justice, he was advised by the same attorneys who asked for the extension, that it was desirable for him to give up the land (Record, p. 107), and the same attorneys, within the period aforesaid, notified plaintiff that Buckley did not intend to pay plaintiff the amount found due to him by the lower Court (Record, p. 105).

We respectfully submit that the grant of the extension, having been met with refusal by Buckley, conferred upon him no rights, but left him in exactly the same position in which he was prior to the time the extension was requested. We submit that this is the construction which should be placed upon the transaction, purely as a matter of common sense.

Buckley on the one hand and the Court on the other were the parties to the transaction, and it should

not be looked upon differently than it would be if a private individual stood in the place of the Court. Buckley sought and obtained an extension of time, within which to do a certain thing, and then deliberately and intentionally refused to accept the offer thus extended to him. This being the case, he can not, by his refusal to accept, gain greater rights than he had before he sought the extension.

THE PERMISSION GRANTED BY THE COURT SHOULD BE CONSTRUED TO BE AN OFFER, NOT MET WITH ACCEPTANCE, AND CONSEQUENTLY AS CONFERRING NO NEW RIGHTS UPON BUCKLEY.

We respectfully submit that the extension was granted as an act of grace to Buckley, and not as an injury to Crane, and that the judge who wrote the opinion granting the extension had no intention of relieving Buckley from liability on the bond in case he failed to avail himself of the privilege granted.

If a transaction is capable of two interpretations, the Court should lean toward that which is in favor of substantial justice. Viewed from this standpoint, when we consider that Buckley was in arrears in payment of interest for nearly five years when the bond in suit was given (Record, p. 11), and that by virtue of the bond he kept Crane out of possession for another year, we certainly say that the action of the Court in granting the extension should not be con-

strued as relieving Buckley from liability on the bond.

ARGUMENT OF DEFENDANTS IN ERROR ANTICIPATED.

As this case has already been briefed in the lower Court, we are to some extent familiar with the claims of defendants in error and deem it proper to anticipate an argument which they will in all probability make.

Opposing counsel will doubtless contend that the right of Buckley to remain in possession is necessarily coincident with his right to redeem. This argument is based upon the fact that in the original decree Buckley was granted a certain time within which he could make the payments and, if he did not make them within that time, he was obligated to surrender possession.

There is no necessary relation between the right to possession and the right to redeem. It will doubtless be claimed that the rights of Messrs. Crane and Buckley may be compared to the rights of mortgagee and mortgagor, and that so long as Buckley was granted the right to redeem, so equally long could he remain in possession.

Counsel are really asking for more than any mortgagor would be entitled to. Had the action been one to foreclose an ordinary mortgage, the defendant could by giving a stay bond remain in possession and postpone the sale. In such a case, if the judgment

was affirmed, the defendant would still have the right to redeem until, usually, long after the sale. It could not be suggested, however, that in case of such affirmance the defendant would not be liable in the bond. In such a case, clearly the right to redeem and the right to remain in possession are not coincident.

It is clear that Buckley only remained in possession by virtue of the bond. If he had not given the bond he would have been dispossessed. If he had appealed and had not given the bond, the upper Court could have granted him eleven days within which to redeem, exactly as it did here. Then, certainly, the right to redeem would have nothing to do with the right to possession. In the supposed case just mentioned, we hardly think the most strenuous counsel would claim that if Buckley had failed to give a stay bond and had gone out of possession by reason of such failure, and had then obtained eleven days within which to redeem, and had failed to avail himself of the privilege, he would nevertheless be entitled to hold Crane for the value of the use and occupation between the time he went out of possession and the expiration of the aforesaid eleven days.

We submit that in the case at bar the right to redeem had nothing to do with the right of possession. The Circuit Court of Appeals, in passing on the petition for a rehearing, said nothing whatever about possession.

THE DECREE ENTERED BY THE LOWER COURT, MODIFYING THE FORMER JUDGMENT, IS A FALSE QUANTITY IN THE CASE AND CAN NOT AFFECT THE QUESTION AS TO WHETHER BUCKLEY MADE GOOD HIS APPEAL.

We are well aware that defendants in error contend that the effect of the order on appeal is broader than its mere terms indicate, and that while it only purported to deal with the right to redeem it really affected the right of possession. This they claim is manifest by the fact that, on the coming down on the mandate to the lower Court, a judgment was made modifying the judgment originally entered in the lower Court (Record, p. 73.)

While we do not think that the judgment entered in the lower Court did in any way change the liability of defendants in error, it appears clearly to us that it is a false quantity in the case. The bond was conditioned that Buckley should make good his appeal. Surely it needs no authority to show that this question must be determined by the action of the Appellate Court.

The action of the upper Court in affirming the judgment conclusively established the liability on the bond.

Davis vs. *Patrick,* 57 Fed., 909.
Babbitt vs. *Shields,* 101 U. S., 7 (25 Lr. Ed., 820).

The form in which the lower Court elected to enter the judgment, as prescribed in the mandate of the upper Court, can in no event affect the question as to whether Buckley prosecuted his appeal to effect.

CONCLUSION.

We believe the foregoing conclusively establishes the fact that Buckley failed to prosecute his appeal to effect, and consequently the judgment of the Circuit Court of Appeals is erroneous and should be reversed. In conclusion, however, we desire to submit the following observations. The judgment was rendered in favor of Crane in the lower Court, which determined that Buckley, not having made payment of even any interest on the contract of purchase of the large tract of land, should be foreclosed of his rights and the possession restored to Crane.

It was purely optional with Buckley to appeal and give a *supersedeas* bond and remain in possession, or appeal and go out of possession. He chose the former course. When we consider that it was purely optional with Buckley to make payment of the purchase price, the contention of his counsel is, in effect, that the Circuit Court of Appeals deemed the judgment of the lower Court too harsh in compelling Buckley to make the payments within the time therein designated, and thereby determined that Buckley should now be allowed the use of the land for six years instead of five without the payment of a cent either of

rent or interest before being compelled to make payment or surrender possession.

After the judgment was wholly affirmed in the Circuit Court of Appeals the petition for a rehearing was filed, and neither it nor the order based thereon attempted to deal with the question of possession. Buckley sought, and upon his representations obtained, an extension of a few days to make payment the large sum required by the decree. It is needless to say that when he made this application, he had absolutely no intention whatever of ever complying with it. He wholly failed to comply with it, and it is needless to say that neither Buckley or his counsel will for a moment contend that by its action the upper Court intended to make Buckley a gift of the value of the use and occupation of six thousand acres of land for one year. We assert it is almost a fraud and trifling with justice to endeavor to have the effect of this order, so graciously granted to Buckley upon his prayer therefor, and which privilege was scorned by him, twisted and construed to deprive Crane of a large sum of money and to give it to the humble suppliant Buckley.

When Buckley appealed, December 16th, 1898, and the bond in controversy was given, he had the right to redeem. When the judgment was affirmed he had lost this right by lapse of time. He asked as an act of grace the privilege of redeeming. The judgment was not by reason of his appeal changed at

all. Buckley did not have a single right, after final judgment was entered in the Circuit Court of Appeals, which he did not have when he took his appeal. How this state of affairs can constitute prosecuting an appeal to effect, is something we fail to see. In the case at bar, the suitor in a Court of equity asks a privilege that full equity may be done unto him. When he obtains it he ignores the purposes for which it was granted him, and, on the other hand, uses it to prevent his opponent from obtaining the value of his land for the full year while at the same time the suitor in equity utilizes the year to waste and destroy his opponent's property.

The laws of our country provide (by R. S., Section 1000) for the giving of a stay bond in certain cases. This law was passed in furtherance of justice, and the object thereof is to enable the defendant to have the judgment of the lower Court reviewed without changing his position, while at the same time to secure to the plaintiff the fruits of his recovery in case it should be determined that the allegations of error are unfounded. As the plaintiff is, by the stay of execution, deprived of the right to his property which the lower Court would otherwise give him, it is the policy of the law that he should have security to indemnify him against the possible contingency of the delay. The law assumes the judgment to be such presumptive evidence of the plaintiff's right that it will not subject him to the hazard arising from fur-

ther litigation without an indemnity from any loss which he might thereby incur. We submit that the section referred to should receive a reasonable interpretation in favor of substantial justice, and unless a judgment is substantially reversed it is affirmed. We submit that Buckley utterly failed to prosecute his appeal to effect, and that the judgment of the Circuit Court in the first instance was correct, and that the judgment of the Circuit of Appeals should be reversed.

Respectfully submitted,

WILLIAM GRANT and
CHARLES S. CUSHING,
Attorneys for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 58.

HENRY A. CRANE, PLAINTIFF IN ERROR,

vs.

CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS, AND TIMOTHY HOPKINS, DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF OF PLAINTIFF IN ERROR.

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(19,815.)

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REPLY BRIEF OF PLAINTIFF IN ERROR.

Opposing counsel have stipulated, allowing plaintiff in error to file a reply brief, and we submit the following observations:

Defendants in error make really one point, viz., "That the permission granted to make payment carried with it the right to remain in possession."

It could not be suggested that, in his petition for a rehearing, Buckley asked for permission to remain in possession without paying for the land, or that the court in its order on such petition dealt with the question of possession at all.

It is suggested, however, that the case where title is reserved in the vendor is to be likened to a mortgage, and

cases are cited to show that such a transaction is somewhat akin to a mortgage. It is then claimed that, in the case of a mortgage, the right to redeem and the right to remain in possession are coincident.

Counsel have cited certain California cases to show the relationship between the right to redeem and to remain in possession. While it will be conceded that the rights of the vendor under an agreement to convey are greater than those of the mortgagee, counsel are claiming greater rights for the vendee under such agreement than a mortgagor could possibly have.

Under section 945 of the Code of Civil Procedure of the State of California, a mortgagor cannot postpone a sale by an appeal without giving a bond to the mortgagee to indemnify him in case of affirmance of the judgment.

In the case at bar counsel claim that they can, by merely obtaining an extension of the right to redeem, obtain the right to remain in possession, while they deny to the vendor the benefit of any security.

The argument of counsel leads to the absurd conclusion that in a case like that at bar the Appellate Court could not extend the vendee's right to redeem for a single instant without depriving the vendor of the use of his premises for perhaps many years. Courts of equity are not so restricted, and such a conclusion is not to be arrived at by mere analogy.

By their second point counsel claim that the obtaining the right to redeem carried with it the right to remain in possession, and in their brief, for the first time during this litigation, claim that the extension was granted because the appellate court thought the time originally granted was too short. In their zeal to make this point they have stated that the time granted was "less than half a month," when in reality it is a month and a half, the date of the decree being November 16, 1898, and the time for redemption included January 1, 1899 (Record, p. 13).

It is ridiculous for defendants to claim that the original time of 45 days was too short, when Buckley was in arrears for years and knew whether he could redeem or not, and when, in his petition to obtain the right, which he had lost only by reason of his appeal, he asked for far less time than 45 days and was only granted 12 days in which to do the same thing (Record, p. 68). On getting the 12 days both he and his counsel decided that they did not want to redeem (Record, p. 105)—something, by the way, which they both knew all along. It is only necessary to refer to the original opinion (page 66) to show that the claim that the time allowed to redeem was too short was neither made by counsel nor considered by the court.

Defendants in error rely chiefly on the point that after the mandate had gone down the lower court entered up a decree changing the time when redemption could be made, and, as the date so changed was the same one up to which Buckley could remain in possession, it is claimed this extended his right to so remain in possession.

It is perfectly clear that neither the petition for rehearing nor the opinion of the upper court thereon in any manner referred, in terms, to Buckley's right to remain in possession. It is contended in favor of the sureties of one who has wasted and destroyed his opponent's property that this order should be extended by construction to cover "possession."

It seems clear that the question as to whether the appeal was prosecuted to effect was determined conclusively by the action of the upper court, and the lower court could no more affect the question than could one which never had any jurisdiction over the controversy.

Davis *vs.* Patrick, 57 Fed., 909.

Babbitt *vs.* Shields, 101 U. S., 7 (25 L. Ed., 820).

The lower court had no jurisdiction to amend its original judgment, except in accordance with the mandate.

Counsel have cited certain cases to show that in order to

hold the sureties on a bond, the judgment must be affirmed in every particular. In so far as they do not sustain any such position, they are at variance with the authorities, including those of this court, cited by us, and we submit that they are at variance with the spirit of the legislation in respect to supersedeas bonds, which is remedial in its nature.

In closing, we submit that Buckley and his sureties are asking that the effect of the decree made by the upper court be extended to include something for which he did not ask in his petition and to which the court did not refer in its order, while at the same time Buckley has been guilty of the most flagrant bad faith in not asking for that which he wanted and in perverting that which was allowed to him to purposes not intended by those granting it, while at the same time he has destroyed his adversary's property.

It is respectfully submitted that the judgment of the lower court should be reversed.

WILLIAM GRANT AND
CHARLES S. CUSHING,
Attorneys for Plaintiff in Error.

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Office Supreme Court,
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No. 58.

In the Supreme Court of the United States

OCTOBER TERM, 1906

HENRY A. CRANE,

Plaintiff in Error,

vs.

CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS and TIMOTHY HOPKINS,

Defendants in Error.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

Brief for Defendants in Error.

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PRESS OF THE JAMES H. BARRY CO.
512-514 LEAVENWORTH ST.

IN THE

Supreme Court of the United States.

HENRY A. CRANE,
Plaintiff in Error,

vs.

CORNELIUS F. BUCKLEY, RUDOLPH SPRECKELS, AND TIMOTHY HOPKINS,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

This is a writ of error prosecuted by the plaintiff in error, Henry A. Crane, from a judgment made and entered in the Circuit Court of Appeals, Ninth Circuit, affirming the judgment, given, made and entered against him in the United States Circuit Court, in and for the Northern District of California, upon the verdict of a jury, rendered in favor of defendants in error, Cornelius F. Buckley, Rudolph Spreckels, and Timothy Hopkins.

But one question is presented for review by this Court. This question has been determined adversely to the contention of plaintiff in error upon two oc-

casions by the said Circuit Court of Appeals, and arises out of the following facts:

On the 16th day of November, 1898, the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, made and entered its decree, in a certain suit therein pending, wherein the plaintiff in error, Henry A. Crane, was the complainant, and C. F. Buckley, one of the defendants in error, was defendant, wherein it adjudged and decreed that said Henry A. Crane, was the owner in fee simple, of certain real property therein described. It further ordered, adjudged and decreed that all of the rights, interest and claims of said C. F. Buckley in and to said real property were forever foreclosed and terminated, subject to the equitable privilege that if he should pay to said Henry A. Crane at any time prior to the 1st day of January, 1899, the unpaid portion of the purchase price of said property, to-wit: $60,000 with interest thereon, and certain taxes and costs, the said Henry A. Crane should convey to him all of said real property, pursuant to an agreement to purchase theretofore made and executed between them.

Said judgment further provided that if the payment should not be made by said C. F. Buckley, *THEN all of his right, interest and claim in and to said real property should be forever foreclosed and terminated, and that said C. F. Buckley should*

be removed and turned out of and from the possession, use and occupation thereof, and that said Henry A. Crane should be placed in and restored to such possession.

It further adjudged that unless the said C. F. Buckley *on or before* said 1st day of January, 1899, filed some satisfactory evidence that he had paid or tendered said money, a writ of possession should issue to the marshal of said Court directing him to remove said C. F. Buckley from the possession of said premises; and to place said Henry A. Crane in the exclusive possession, use and occupation thereof. (Record pages 6-11).

From the language contained in, and terms of this decree, it will be observed by the Court that at the time it was made and entered, the said C. F. Buckley was and for a long time prior thereto had been in the exclusive possession, use and occupation of said land, and that the Court itself did not consider that he could or should be removed from the possession thereof until *after* the expiration of the time during which he had the right to complete the purchase of the said real property by paying to the plaintiff in error, Henry A. Crane, the amount found to be due, by said Court, as the balance of the said purchase price.

Thereafter, the said C. F. Buckley, being dissatisfied with said decree, prosecuted an appeal there-

from to the United States Circuit Court of Appeals; and for the purpose of staying the execution of said judgment, as to costs, *and in so far as it directed the restitution of the possession of said premises,* he filed with the Clerk of said Circuit Court a supersedeas, bond, in the sum of eight thousand dollars, executed by him as principal, and by Timothy Hopkins and Rudolph Spreckels, the remaining defendants in error herein, as sureties. This bond contains the following language:

> "Whereas, the said respondent and cross-complainant is desirous of staying the execution of the said judgment so appealed from *in so far as it relates to the possession of the land and premises involved therein,* and is desirous of staying the execution of said judgment or decree, so appealed from, in so far as it relates to the costs awarded to complainant therein.
>
> "Now, the condition of the above obligation is such that if the said C. F. Buckley *shall prosecute his appeal to effect,* and shall answer all damages and costs that have been and shall be awarded against him, if he fails to make his appeal good, *and if he shall answer all damages that shall accrue to the said respondent by reason of the value of the use and occupation of the land and premises from the time of said appeal until the delivery of possession thereof to said Henry A. Crane, and for all waste committed thereon, then the above obligation to be void,* else to remain in full force and effect." (Record pages 14-16.).

On the 2d day of October, 1899, the Circuit Court of Appeals, being the Court to which said appeal was taken, rendered its judgment affirming the decree of the lower Court. (Rec. p. 66-7). Thereafter, the appellant therein, C. F. Buckley, filed with the said Circuit Court of Appeals, a petition for the rehearing of said appeal, and on the 19th day of October, 1899, said Court of Appeals, modified its former decision, and in its opinion, rendered upon said rehearing, used the following language:

> "The record does show that the appellant *made large payments under the contract,* and that he has made other large expenditures in the improvements of the property, which was the subject of the contract. It is also true that the sums remaining due from the appellant under the contract were large. These payments, the decree of the Court below, which was entered on the 16th day of November, 1898, required to be made prior to January 1st, 1899, *in order that the rights and interests of the appellant in the property be saved,* WHICH WERE BY THE DECREES OTHERWISE FOREVER FORECLOSED AND ENDED. Under the circumstances appearing in the record this Court is of the opinion that it is equitable and just to allow the appellant until the 1st day of November, 1899, within which to make the payments required by the decree from which the appeal is taken, and, accordingly, it is ordered that the judgment of this Court on the 2d day of October, 1899, be, and hereby is, so modified as to read: 'Cause remanded to the Court below, with direc-'tions to substitute for the first day of January,

> '1899, the first day of November, 1899, within 'which the payments therein provided for are 'permitted to be made, and, as so modified, the 'decree is affirmed.'" (Record pp. 68-9.)

Thereafter, the mandate of said Court of Appeals, issued to the lower Court, by which the lower Court was directed to modify its decree by substituting for the 1st day of January, 1899, the 1st day of November, 1899, within which the payments therein provided for are permitted to be made. (Record pp.)

Pursuant to this writ of mandate, the United States Circuit Court made and entered its final decree, which contained the following provision:

> "It is hereby ordered, adjudged and decreed that the former decree of this Court made and entered herein on the 16th day of November, 1898, be and the same is hereby modified by substituting for the words and figures 'first (1st) day of January, one thousand eight hundred and ninety-nine,' where the same occurs on pages 4, 5, and 6, of said former decree, the words and figures 'first (1st) day of November, 1899,'" (Record pp. 73). No appeal was ever prosecuted from this decree, so that it became the final decree in the action in which said appeal aforesaid was prosecuted, and upon which appeal said supersedeas bond was given.

As the date "January 1, 1899," only appeared in the original decree on the pages designated in the modifying decree, it will be observed by the Court that the effect of this modifying decree was to substitute

the first day of November, 1899, for the first day of January, 1899, wherever it occurred in the original decree, so that under the decree as modified, the estate, rights and interest of said C. F. Buckley, the defendant therein, in and to the premises involved in the controversy were NOT foreclosed or terminated, and he *was entitled to remain in possession of the premises and could not be dispossessed therefrom until the first day of November, 1899; nor could a writ of possession have issued until after that date.* On November 1, 1899, said C. F. Buckley was ready to deliver possession of said premises over to plaintiff in error, but at the request of plaintiff in error actual possession was not finally given him until November 4, 1899. (Record, p. 104-6)

This action was commenced against the defendants in error by the plaintiff in error to recover the sum of $8000, the penalty of said bond, for the alleged value of the use and occupation of said premises, and for waste alleged to have been committed by said C. F. Buckley thereon between the first day of January, 1899, and the first day of November, 1899. (Record, pp. 1-6.) The costs of said action were not involved as they had been paid in full before the commencement of the action.

Upon the first trial in the lower Court, the defendants in error contended, as they still contend, that by reason of the modification by the Circuit Court of

Appeals of the decree entered in the original action, wherein plaintiff in error was complainant, and defendant in error, C. F. Buckley, was defendant, and by reason of the final decree made by the Circuit Court in that action, pursuant to the mandate of the said Court of Appeals, from which no appeal was ever taken, the original decree was so modified as to permit the defendant therein to *remain in possession of said premises until November 1st, 1899, by virtue of the terms of the decree,* for which reason he complied with the conditions of the bond, and did prosecute said appeal to effect, so far as the possession of the premises was concerned; in other words, that under the decree in said action as modified, and not because of the supersedeas bond given by him upon said appeal, he had a right to remain in possession of said premises until November 1st, 1899, when, and not until when, his interests were terminated, and the writ of possession would be permitted to issue.

Upon the first trial of this case, the Circuit Court refused to instruct the jury in accordance with the theory upon which the defense proceeded, and, accordingly, a verdict of $5,000 was rendered by a jury, upon which judgment was entered against defendants in error. (Record, p. 44-5) Subsequently this amount was reduced to $3,000, upon motion for new trial. (Record, p. 48.)

From this judgment, as modified, an appeal was prosecuted by defendants in error to the Circuit Court of Appeals, which, after a full consideration of the case, rendered its decision, sustaining the contention of the defendants in error, and reversing the judgment of the lower Court.

In its opinion, the Circuit Court of Appeals reviewed its decision in the original suit in equity in which the supersedeas bond was given, and held *that in modifying the decree in that case it intended not only to extend the time during which the appellant therein, C. F. Buckley, had a right to make the payments until November 1, 1899, but likewise directed that until that date his interest in the property, which included his right to remain in possession thereof, should not be foreclosed.* (Record, p. 173)

From this decision, so rendered by the Circuit Court of Appeals, no appeal was taken to this Court, and it, therefore, became the law of the case. Subsequently, another trial was had in this action, in which, under appropriate instructions, following the decision of the Circuit Court of Appeals, a jury rendered a verdict in favor of the defendants in error. (Record, p. .) Another appeal was taken by the plaintiff in error to the Circuit Court of Appeals, which again reviewed the question formerly considered and determined by it, and affirmed the judgment of the

Court below. (Record, p. 162) From this judgment, this writ of error is prosecuted.

Under these circumstances, the sole question to be determined by this Court upon this writ of error is whether the said C. F. Buckley, in the original action wherein plaintiff in error was complainant, and the said C. F. Buckley was defendant, did prosecute his appeal to effect, so far as the possession of the said premises was concerned, between the first day of January, 1899, and the first day of November, 1899. If so, as has already been determined upon two occasions by the Circuit Court of Appeals, by which the modified decree was made, then the judgment of the lower Court must be affirmed.

ARGUMENT.

I.

THE RIGHT OF DR. C. F. BUCKLEY TO REMAIN IN POSSESSION OF THE PREMISES WAS CO-EXTENSIVE WITH HIS RIGHT TO COMPLETE THE PAYMENT OF THE AMOUNT ADJUDGED TO BE DUE HENRY A. CRANE.

From the decree rendered in the original action of "*Henry A. Crane* vs. *C. F. Buckley*," it may be gathered that some years prior to the commencement of that suit, C. F. Buckley, one of the defendants in error, and Henry A. Crane, plaintiff in error, entered

into a contract for the purchase by said C. F. Buckley, from said Henry A. Crane of the real property described in said judgment and decree, and that by reason of said contract the said vendee, C. F. Buckley, was given possession thereof. Upon this contract, as it is stated in the decision of the Court of Appeals rendered upon the petition for rehearing in that suit, the said C. F. Buckley had paid to Henry A. Crane a large amount of money.

Under such circumstances, where the vendor enters into a contract for the sale of real property, but retains the legal title thereto in his own name until the balance of the purchase price has been paid, and as security therefor, such security is in the nature of a mortgage, as was said in the case of

Gessner vs. *Palmateer*, 89 Cal., 91-97.

> "Where the vendor holds the legal title under an unexecuted contract for the conveyance of the land upon payment of the purchase money, the transaction shows upon its face that he holds it as security. The vendee cannot prejudice that title, or in any way divest it, except by performance of the act for which the vendor holds it. The vendor's security is something stronger than a mortgage, because the legal title is retained as security (cases cited). It has been called an imperfect or equitable mortgage, which is a more appropriate term than vendor's lien. In many of the best considered cases, including *Sparks* vs. *Hess*, 15 Cal., 186, it is treated as if it had the similitude of a mortgage, *subject to foreclosure in the same way*

a mortgage is foreclosed. * * * Where the title is not to pass until the vendee pays the purchase price, the land is by express contract held in pledge for such payment, and the notes and contract may be considered as an instrument in the nature of a mortgage. It is a lien by contract, is an incident to the debt, and the assignee of notes given for the purchase money, like the assignee of a note secured by mortgage, is entitled to the benefit of the security.

"There are a few decisions to the contrary, some of which inveigh against the rule, and emanating, as they do, from highly respectable authority, are entitled to careful consideration; but they bear evidence of a departure from sound legal rules, and will be found generally to have been influenced by decisions in cases where the legal title had passed to the vendee, thus overlooking the distinction we have attempted to point out, and which is paramount always in determining questions of this kind. The authorities preponderate very decidedly in favor of the view we have expressed."

And in the case of

Dingley vs. *The Bank of Ventura,* 57 Cal., 471,

where the deed of conveyance expressly reserved a lien for the balance of the purchase price, the Court said:

"The lien reserved by Huse was something more than a vendor's lien. * * * In the case under consideration the purchase price remaining unpaid, was *not* unsecured, otherwise than by

personal obligation of the buyer, for the parties to the deed expressly contracted that the vendor should have a lien for the unpaid purchase price. It is not, therefore, a vendor's lien, but rather a lien secured to the vendor by the contract of the parties. It was, in effect, though not technically, a mortgage. In *Jones on Mortgages,* paragraph 229, it is said: 'A lien for the purchase money, expressly reserved by a vendor in his deed of conveyance, is a lien, created by contract and not by implication of law. It is a contract that the land shall be burdened with the lien until the note is paid. It is really a mortgage. The lien, then, becomes a matter of record when the deed is recorded. It is not waived by the taking of other security, as in the case with an ordinary vendor's lien. It is governed by the rules that a mortgage is. It passes by an assignment of the note secured by it. It is foreclosed as a mortgage is, and there is the same right of redemption for a limited period after a foreclosure sale.' * * * A Court of Equity looks through the form to the substance of the matter before it, and where, as here, it finds a contract in the deed of conveyance securing to the vendor a lien on the land sold for the unpaid purchase price, it treats it as, what is substantially, a mortgage."

See, also,

Avery vs. *Clark,* 87 Cal., 619.

In

Sparks vs. *Hesse,* 15 Cal., 194.

where the vendor entered into a contract with the

vendee for the purchase and sale of certain real property, the conveyance of the same to be executed when the balance of the purchase price was paid, the Court used the following language:

> "The Court after determining the amount of the lien, can by its decree direct a sale of the property in the first instance for a satisfaction, and execution for any deficiency, or award an execution in the first place, and a sale only in the event of its return unsatisfied, as the justice of the case and the equity developed in its progress may require. * * * This is not a suit to enforce a vendor's lien, after conveyance executed, but to enforce such a lien where the contract of sale remains unexecuted. * * *
>
> "In the present case the vendors have retained the legal title, and evidently as security for the purchase money. *Their position is, in some respects, similar to what it would have been had they executed a conveyance to the vendee and taken from him a mortgage upon the property.* A mortgage is in form a conveyance of the legal title, though entendered only as a security for the debt. Here the title is retained by the vendors for a particular purpose, for a similar purpose of security. A mortgagee may pursue his remedy at law, or proceed in equity for the sale of the premises. A vendor retaining the title may in like manner sue at law for the balance of his purchase price, or file his bill in equity for the specific performance of the contract, and take an alternative decree that if the purchaser will not accept the conveyance and pay the purchase money, the premises be sold to raise such money, and that the vendee pay any deficiency remaining

after the application of the proceeds arising upon said sale. * * *

"The vendor is at liberty to ask either a decree, directing performance, and in case of refusal, a sale of the premises, or a decree barring the right of the vendee to claim a conveyance under the contract. He may, however, insist upon the sale, where the performance is refused, and is not bound to take a mere foreclosure of a vendor's right to a deed. * * * The form of the complaint was more that of an ordinary complaint in a mortgage case than a complaint for specific performance, *and the decree is not, as it should be, in the alternative.*"

It is clear from these authorities, therefore, that where the vendor retains the legal title in himself as security for the payment to him of the unpaid portion of the purchase price, the security thus retained is in the nature of a mortgage. This being true, it must necessarily follow that the vendee possesses practically the same rights as he would have possessed had the vendor executed to him a conveyance, and as security for the balance of the purchase price, procured from the vendee a mortgage upon the real property. In such a case the mortgagor would have the right to remain in the possession of the mortgaged premises, not only until after judgment of foreclosure had been rendered and a sale of the premises effected, but until his right to redeem from the foreclosure sale should have expired, for as long as his equity of redemption existed just so long did he possess some right, interest

and estate in the property, which would become converted into a fee simple estate upon his paying the amount due the mortgagor. As was said in

Purser vs. *Cody*, 120 Cal., 218,

> "The plaintiff acquired no right to the possession of the property by virtue of the sale to him under the judgment in the action to foreclose his mortgage against the corporation *until the time for a redemption from this sale had expired, the judgment debtor or its successor in interest in the property was entitled to its possession.*"

Where suit is commenced by the vendor, who has retained legal title in himself to declare terminated the rights and interests of the purchaser, the Court before whom the action is tried, if the allegations of the complaint are true, *is obliged to enter a decree in the alternative* permitting the vendee to complete his purchase or pay the balance due as found by the Court within a certain time, and determining that if such be not done, then *at the expiration* of that time all his rights and interests in the premises be forever terminated and foreclosed. Until, however, the expiration of this equitable privilege afforded the purchaser has expires, he is permitted to enjoy all of the benefits which have accrued to him by reason of his contract of purchase, *including the right to remain in the possession of the real property*. In other words, the right to remain in possession constitutes an ele-

ment of his interest in the land which is not foreclosed or terminated until he has refused to comply with the provisions of the decree by paying the amount ascertained by the Court to be due to the vendor.

So far as the right to remain in possession of the premises is concerned, the only distinction between the case where a vendor retains the legal title to the property, as security for the payment of the balance of the purchase price, and one where a vendor transfers the legal title to the vendee, taking back a mortgage, after default in the payment of the balance due, is as follows:

In the first case, the vendor has a right to bring an action, in strict foreclosure, in which the Court is obliged to make a decree in the alternative, fixing a time by which the balance due is to be paid, or at which, in the event of the failure to pay the balance due, all of the interest of the vendee is foreclosed. In this case, the vendee has a right to remain in possession of the premises until the date fixed in the decree. In the latter case, the vendor must bring an action to foreclose his mortgage, in which event the vendee has a right to remain in possession of the property until his right to redeem has expired.

It follows, therefore, that the right to remain in possession of the purchased premises *is co-extensive with the right to pay the balance of the purchase*

price, and that until that period of time has expired none of the rights of the vendee in and to the premises can to any extent or by any method except by agreement, be interfered with or prejudiced.

The position assumed by the defendants in error in the case at bar was appreciated by the lower Court in the suit in which the supersedeas bond was executed for the reason that the decree itself expressly provided that the estate and interest of the defendant therein, C. F. Buckley, *should not be foreclosed or terminated until the first day of January, 1899,* on or before which he was afforded the privilege of paying the balance of the purchase price. And as further evidence of this conclusion of the lower Court, it was further provided that the writ of possession to be issued in the event that the balance of the purchase price was not paid, was not to issue until *after* the first day of January, 1899.

II.

THE APPEAL WAS PROSECUTED TO EFFECT SO FAR AS THE POSSESSION OF THE PROPERTY WAS CONCERNED, BETWEEN JANUARY 1, 1899, AND NOVEMBER 1, 1899, AND, THEREFORE, THE SURETIES UPON THE SUPERSEDEAS BOND WERE RELIEVED FROM ALL LIABILITY TO PLAINTIFF IN ERROR.

It will be remembered by the Court that the *SOLE* consideration for the execution of the supersedeas bond by the defendants in error was to stay the effect

of the decree entered by the Court below in the suit in which it was given *ONLY so far as it effected the possession of the property,* and the costs of that suit. These costs were afterwards paid in full before the commencement of this action, are not referred to in plaintiff's complaint, and are, therefore, not involved in this action.

The supersedeas bond, having been executed by the defendants in error for the purpose of permitting the said C. F. Buckley to retain possession of the said premises during the pendency of said appeal, if the effect of the decision of this Court upon that appeal was such as to have extended Dr. Buckley's right to remain in possession of the said premises until the first day of November, 1899, by virtue of the decree itself, then it follows that there was no consideration for the bond, and that so far as defendants in error in this case are concerned, the appellant in that case, C. F. Buckley, did prosecute his appeal to effect.

That such was the effect of the decision rendered by the Court of Appeals must be apparent.

The original decree, as made by the Circuit Court, as has already been shown, provided that the defendant therein, Dr. C. F. Buckley, should have until January 1, 1899, a period of less than half a month, within which to pay to the complainant, Henry A. Crane, the amount adjudged to be due by the Court, or on said date suffer all of his interests in said prop-

erty, including his right to remain in possession, to be absolutely foreclosed. It was also provided that if said payments were not made, then the writ of possession should issue at any time after said 1st day of January, 1899.

Let us assume that instead of fixing the date upon which said payment was to be made, said rights foreclosed, and said writ of possession issued, as "January 1, 1899," the Circuit Court had provided that the defendant, Dr. C. F. Buckley, should have until November 1, 1899, within which to make such payment, and that upon his failure to make such payment at that time, his interest in said property would be foreclosed, and a writ of possession issued, and let us assume further that an appeal had been taken from such decree to the Circuit Court of Appeals, and a supersedeas bond given to stay the execution of said judgment, so far as the possession of the premises was concerned, and such decree had been affirmed upon such appeal. If an action were thereafter commenced by Henry A. Crane, against the sureties upon said supersedeas bond to recover the value of the use and occupation of said premises, and for all waste committed thereon between January 1, 1899, and the 1st day of November, 1899, would not the sureties establish a complete defense to said action by showing that *by the very terms of the judgment* from which the appeal had been taken, the appellant had

an absolute right to remain in possession of the property, because his interests therein, including his right to remain in possession, were not foreclosed until November 1, 1899, at which time he had tendered to Crane the possession of said premises, and that, therefore, the execution of the supersedeas bond was entirely unnecessary, and without consideration? That no recovery could be had in such an action is beyond all question. And if we are correct in this assumption, it likewise follows that no recovery can be had upon the supersedeas bond herein involved.

In the decision rendered by the Circuit Court of Appeals, upon the appeal taken to it by Dr. C. F. Buckley, from the decree made and entered by the Circuit Court, it in effect determined that while the decree was correct and should be affirmed as to all matters excepting the fixing the date by which Dr. Buckley had to make his final payment, and upon which, in the event of his failure to make such payment, his rights would be foreclosed, it was inequitable and unjust, in view of the large amount of money paid to Crane, and expended by Dr. Buckley upon said premises, to allow him so short a time as it did within which such payment should be made, or his rights foreclosed. And, in that respect, it had committed error, while it affirmed the judgment in so far as all other matters were concerned, it *in effect* reversed it in so far as it related to Dr. Buckley's right

to remain in possession of the premises only until January 1, 1899, extending such right until November 1, 1899, before which time possession of the premises was tendered by him to Crane. In other words, if, instead of affirming the judgment, the Circuit Court of Appeals had reversed the judgment, with instructions to enter a judgment similar to that entered by the lower Court upon the filing of its mandate, the plaintiff in error would concede that the appeal had been prosecuted to effect. Can it then be held, that because the Circuit Court of Appeals, instead of taking this action, itself modified the original decree, and directed the lower Court to enter a judgment in accordance with its determination, which judgment (if it had been the original judgment in the case) would have rendered the execution of a supersedeas bond unnecessary, it caused the sureties upon such supersedeas bond to become responsible to complainant?

That such cannot be the law is evident from a mere statement of the proposition itself. And that the Court below so construed the decision of the Court of Appeals is evidenced by the fact that *pursuant* to the writ of mandate issued by the Court of Appeals, it made and entered a final or modifying decree, in which it not only extended the time within which these payments should be made until and including November 1, 1899, but in addition thereto, changed

the date upon which said C. F. Buckley's interest in the premises (which included his right to remain in possession), should be terminated and foreclosed until *November 1, 1899.*

This decree was prepared by *Counsel* for plaintiff in error, as appears from the endorsements thereon (Record, p. 73), and they themselves must have been forced to the same inevitable conclusion. But in any event, it was a final determination of that controversy, for the reason that no appeal was ever taken therefrom, so that at the commencement of this action, the final decree in the litigation in which the supersedeas bond was executed, and which superseded the original decree, *actually provided that the said C. F. Buckley's interest in and to said premises should not terminate until November 1st, 1899, and that no writ of possession should issue directing the Marshal to place the said Henry A. Crane, in possession, until after that date.* (Record, p. 73.)

But without recourse to this final decree, which is conclusive, between the parties, it must be apparent to the Court that the modification of the original decree, as directed by the Court of Appeals, extending the time within which Dr. Buckley could pay to said Crane the balance due him, also carried with it the right to remain in the possession of the premises, for, as we have already stated, just so long as he had the right to pay the balance of the purchase price and

receive from Crane a deed of conveyance, just so long did his right to remain in the possession of the premises exist; for as long as he had a vested right to receive a conveyance of the property upon completing the payments, just so long did he possess an interest therein.

Suppose on or before November 1, 1899, Dr. Buckley had paid to Henry A. Crane the balance of the purchase price, and had received from him in consideration thereof a conveyance of the premises, would the defendants in error in that event have been obliged to pay to Crane the value of the use and occupation of the premises, or for any waste which might have been committed thereon between January 1, 1899, and November 1, 1899? Obviously not. And if not, then it must logically follow that Crane cannot recover, under the circumstances disclosed by this record, for the reason that just so long as the defendant in an action in strict foreclosure has a right to complete the purchase price found to be due by the Court, just so long does his interest in the property, which carries with it the right of possession where he has been placed in possession pursuant to the terms of a contract, remain unimpaired.

It is suggested by plaintiff in error that if Dr. C. F. Buckley exercised the right given him by the decision of the Court of Appeals, he would have been entitled to receive from Buckley the amount of in-

terest that had accrued upon the amount found to be due him by the Court, until the option was exercised. This, however, is a false quantity in the controversy.

If Dr. Buckley on the 1st day of January, 1899, had exercised the option given him by the lower Court, he woulld have been obliged to have paid interest to that date, nevertheless, he was entitled to remain in possession of the property until that time, irrespective, even though he had no intention of making such payment. If, by the judgment of the lower Court, this date had been fixed at November 1, 1899, instead of January 1, 1899, the same result would have followed. While Buckley would have been compelled to pay accrued interest up to the time he exercised the option—if he did exercise it—in the event of his failure so to do, he would have been entitled to remain in possession of the premises until November 1, 1899, without making any payment whatever. This period of time is fixed by the lower Court, after taking into consideration, the amount of principal and interest already paid by the vendee, which, upon foreclosure, constitutes a total loss to him.

In the case at bar, Dr. C. F. Buckley had paid Crane on account of the purchase price of the property nearly $60,000, and in addition thereto had expended vast sums of money in improving and endeavoring to reclaim from alkali the premises in

question. These moneys represented a total loss to him. It was evidently because of these facts that the Court of Appeals rendered the judgment, to which reference has already been made.

The only part of the decree entered in the lower Court in the action in which the supersedeas bond was given, with which the appellants in this case were or are concerned, is that part relating to the possession of the property. This is apparent because if the original decree had provided that Dr. Buckley should have until November 1, 1899, in which to complete the payment for the property, and that until the expiration of that time his rights to an interest in the premises involved in said suit should not be terminated, and that no writ of possession to oust him from the occupation thereof could be executed or issued, then there would be no consideration for a bond for the reason he would have retained possession of the land, *not* because of any supersedeas bond, but because of his right so to do created by his contract with Crane and the judgment of the Court rendered thereon.

Powers vs. *Crane,* 67 Cal., 65.
Powers vs. *Chabot,* 93 Cal., 263.
McCallion vs. *Hibernia S. & L. S.*, 98 Cal., 442.

Therefore, if the original decree was modified by

this Court so as to effect the same result, it must likewise follow that the appeal of Dr. Buckley to this Court from the decree, *so far as the right to remain in the possession of said property until November 1, 1899, was concerned, was prosecuted to effect, and no breach of the supersedeas bond occurred.*

It is well settled that the surety's obligation is *strictissimi juris,* and that he has a right to stand upon the precise terms of his contract.

Elder vs. *Cutner,* 97 Cal., 490.
People vs. *Bustis,* 11 Cal., 220.
McDonald vs. *Fett,* 49 Cal., 355.
Pierce vs. *Whiting,* 63 Cal., 543.

And the modification of the original decree, being in effect a reversal of that decree, so far as it purported to limit Dr. Buckley's right to the possession of the land to January 1, 1899, which was the SOLE portion of the decree on appeal for which the supersedeas bond was given, released the plaintiffs in error from all liability to the defendant in error.

In so holding, the Circuit Court of Appeals in this very action, speaking through Mr. Justice Ross, the learned Judge by whom the decision of that Court in the original action was rendered, after reviewing the facts, said:

"As will have been seen, the purpose of the bond sued on was the staying of the execution of

the decree appealed from in so far as it related to the possession of the land and premises involved therein, and in so far as it related to the cost awarded to the complainant therein, and its condition was that Buckley should prosecute his appeal to effect, and answer all damages and costs awarded against him in the event he should fail to make his appeal good, and pay all damages that should accrue to the respondent, Crane, by reason of the value of the use and occupation of the land and premises from the time of the appeal until the delivery of possession thereof to him, and for all waste committed thereon.

"We do not understand the learned counsel for plaintiffs in error to deny that for the waste and for the value of the use and occupation of the premises by Buckley after the expiration of the time fixed by the modified decree within which he was allowed to complete the payment for his property, the plaintiffs in error are liable; but he insists that for the use and occupation of the premises by Buckley up to the expiration of that time, neither he nor his sureties are responsible on the bond. Instructions to that effect were requested by the plaintiffs in error, and refused by the Court below, and, instead, the jury was instructed that the plaintiff in the action (defendant in error here) was entitled to recover upon the bond the value of the use and occupation of the land and premises from January 1st, 1899, which was the time fixed by the Circuit Court in the decree as originally entered within which Buckley was permitted to complete his payments for the land and premises, and secure title thereto. The theory of the Court evidently was that it was apparent from the original decree, as indeed it is, that Buckley was, under the contract of sale and

purchase, put into possession of the premises and was entitled to their use and occupation during the life of the contract. According to the decree as originally entered that life ended January 1st, 1899, unless Buckley, prior thereto, complied with the conditions of the decree.

"It is true that this Court, by its judgment first given, affirmed that decree, but upon a petition for a rehearing, it reconsidered its judgment and directed the Court below to modify the judgment from which the appeal was taken by substituting for the first day of January, 1899, the first day of November of the same year, which was done—thus extending the time within which Buckley was permitted to make the deferred payments and secure the title to the property contracted for, and in effect, keeping in force the provisions of the agreement, including the right of possession of the premises in Buckley until the day last named. This was a substantial modification of the original decree of the Circuit Court, gained by virtue of the appeal, which cannot, therefore, be properly said to have been without effect. We are of the opinion that the defendant in error was no more entitled to recover the value of the use and occupation of the premises in question during the enlarged time finally granted Buckley within which to make good his covenants, than for the period of grace first fixed by the trial Court, in respect of which the defendant in error asserts no right even in his complaint.

"The judgment is reversed, and cause remanded for a new trial." (Record, pp. 171-173, ..., Fed., .)

This decision should be conclusive authority upon the legal proposition to be determined by this Court,

for the reason that it was rendered by the very Court which had rendered the former decision under consideration, and that Court, better than any other Court, was in a position to know what it intended by using the language contained in its former decision.

The same proposition was again called to the attention of the Circuit Court of Appeals, upon the writ of error prosecuted to it by the plaintiff in error, from the second judgment entered therein, and was determined by it in the following language:

> "The only point involved in this writ of error is, 'Did the defendant Buckley prosecute his appeal to effect?' The question was answered in the affirmative by this Court in *Buckley* vs. *Crane*, 123 Federal, 29, 33. The rulings of the Court below in the trial of the present case, were in accord with the views heretofore expressed by this Court." (See Record, 162-3.)

In addition to these two decisions, however, we desire to direct the Court's attention to the following cases which sustain the contention of defendants in error:

In

Heinlen vs. *Beans*, 71 Cal., 295.

which was an action for specific performance, the plaintiff recovered a judgment against defendants for

the sum of $10,000, the value of the use and occupation of the land in controversy, and directing the defendants to execute a deed of conveyance of the land to plaintiff, and deliver to him possession thereof. An appeal was taken from this judgment and from an order subsequently made denying defendant's motion for a new trial. On this appeal the defenadnts filed a supersedeas bond, which contained the following language:

> "And whereas the appellants are desirous of staying that part of said judgment directing said defendants and appellants to execute a deed to said plaintiff and respondent, and also to deliver to the plaintiff the possession of the premises described therein, and the Judge of this Court having fixed the amount of the undertaking for that purpose at five thousand dollars;
>
> "Now, therefore, in consideration of the premises, and the said stay of the execution of the judgment, we do further jointly and severally undertake and promise, and do acknowledge ourselves bound in the further sum of five thousand dollars, that during the possession of such property by the appellants they will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, or the appeal be dismissed, they will pay the value of the use and occupation of the property from the time of the appeal to the delivery of the possession thereof, pursuant to the judgment, not exceeding said sum of five thousand dollars."

On appeal the judgment was reversed for the sole

reason that the judgment should be for five-sixths of the land, instead of the whole, and for a like proportion of the rent from a certain date, and the cause remanded with instructions to the Court below, TO MODIFY *the judgment in accordance with the opinion, and enter judgment in favor of plaintiff for that proportion of the land and the $10,000.50.*

The remittitur was transmitted to the Court below with the judgment of said Court and its opinion containing the directions with reference to the modification of the judgment. Pursuant to this remittitur, the Court MODIFIED the judgment. No testimony was taken or other proceeding had.

On appeal from the judgment in favor of plaintiff against the sureties on the bond, the Supreme Court said:

> "The contention of defendant is, that there is no breach of the undertaking committed by them until the affirmance of the judgment, or the dismissal of the appeal. The plaintiff concurs in this view, and such are the words of the undertaking. By its express words the defendants only agree to pay when the judgment *is affirmed or the appeal dismissed.* But the plaintiff puts forward the contention that the judgment in *Heinlen* vs. *Martin* was affirmed. The Court below was of the same opinion, and so held. Now, if this judgment was affirmed at all, *it was only affirmed in part*, and the undertaking does not impose on the parties the obligation to pay on any such contingency, *but only in case the judg-*

ment appealed from is affirmed. We construe this to mean affirmed as rendered by the Court below. It does not mean affirmed in part. * * *

"For the reasons above given, the judgment and order are reversed and cause remanded, and the Court below is directed to enter judgment for defendants."

And as evidence of the fact that the Supreme Court itself considered that the judgment entered by the lower Court in the case last cited, pursuant to the remittitur was in effect the same as though the judgment had been modified in the appellate tribunal, it subsequently dismissed an appeal taken from the judgment as modified upon the ground that no appeal could be taken therefrom, and seriously considered the proposition that the attorneys prosecuting the appeal might be guilty of contempt for so doing.

Heinlen vs. *Beans,* 73 Cal., 340.

The case under discussion is much stronger than the case last cited for the reason that the very part of the judgment entered by the Court below to stay the execution of which the supersedeas bond was given was so modified by this Court that if the original decree from which the appeal was taken had been in the same condition in which it was after the modification was made, then the appellant, C. F. Buckley, would have been entitled to remain in pos-

session of the property until November 1, 1899, several weeks after the appeal had been finally determined, and it would not have been necessary for him to have given any supersedeas bond at all.

And in the case of

Chase vs. *Ries,* 10 Cal., 518

Mr. Chief Justice Terry, speaking for the Court, said:

> "This is an action of an appeal bond executed by defendants conditioned to pay the judgment appealed from, if the same should be affirmed by the Appellate Court.
>
> "It appears from the record that the judgment appealed from was reversed, *with directions to the Court below to enter a different judgment,* consequently, no liability attached to defendants under the conditions of the bond."

This case was cited with approval in the case of

Heinlen vs. *Beans, supra.*

In *re Hawes* vs. *Sternheim, Executrix,* 57 Ill., App. 126, which was an action based upon an appeal bond, it appeared that the deceased executed a bond on appeal from the Apellate Court of Illinois, to the Supreme Court, from a judgment rendered in a case of forcible entry and detainer. The bond was in the penal sum of $8000, and contained the following provisions:

"The condition of the above obligation is such that, whereas, the said B. F. Hawes did on the 4th day of May, 1892, in the Circuit Court of Cook County, aforesaid, recover a judgment against the above bounden Joseph Zuckerman for the restitution of certain premises, described as follows (Describing them): from which judgment an appeal has been taken. * * * * *

"Now, therefore, if the said Joseph Zuckerman *shall prosecute said appeal to effect* and pay all rent due or that may become due before the final determination of the suit, and also all damages and loss which the said B. F. Hawes may sustain by reason of the withholding of the premises in controversy, and by reason of any inury done thereto, during such withholding, until the restitution of the possession thereof to the said B. F. Hawes, together with all costs that may accrue in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void, otherwise to remain in full force and effect."

On appeal from a judgment rendered in favor of the defendants, the Court held that the obligors were liable ONLY in the event that the "Judgment from "which the appeal was taken SHOULD *be affirmed, or the appeal dismissed.*"

In the case of

Daggett vs. *Mensch,* 141 Ill., 396

which was an action upon an appeal bond given in an action of forcible entry and detainer, which bond was conditioned as follows:

"If the said Mary Mensch *should prosecute her appeal with effect,* and should pay to the plaintiff all rent then due, and that might become due before the final determination of the said suit, and all damages and loss, which the said plaintiff might sustain by reason of the withholding of the premises in controversy, and by reason of an injury done thereto, during such withholding, together with all costs until the restitution of the possession thereof to plaintiff, in case the judgment from which the appeal was taken should be affirmed or the appeal dismissed, then said bond was to be void, otherwise to remain in full force and effect."

In the complaint it was alleged "that said suit was finally terminated by order of said Circuit Court, then duly entered of record, and that said defendant did not prosecute her appeal to effect." On appeal from the judgment in favor of defendants, the Court said:

"The averment that on May 26, 1890, said suit was finally terminated by order of said Circuit Court, then duly entered of record, is manifestly insufficient to fix the liability of appellees, because the order so rendered may have been in favor of the appellees, but by the terms of the bond, they are liable only in the event *that the judgment from which the appeal was taken, should be affirmed or the appeal dismissed.*"

Judgment affirmed.

In the case of

Poppenhausen vs. *Selley, et al.,* 41 Barb., 450

an order was made sustaining a demurrer and rendering judgment in favor of the plaintiff. An appeal was taken and a stay bond given, which provided that the sureties would pay the penalty thereof, if the judgment should be affirmed. On appeal, the Court made an order "that the said judgment be and the "same is hereby affirmed, except that the defend- "ants have leave to answer the complaint within "twenty days." On appeal from a judgment in fafor of defendant, it was said:

> "There was no liability of the defendants under their undertaking until the condition of an *absolute affrmance was accomplished.* The defendants were to be liable only upon *absolute affirmance* of a judgment rendered upon issues of law arising upon demurrer to the complaint. * * The sureties are entitled to the protection of a strict construction in their favor, of the contract, whereby they have agreed to become bound."

Judgment affirmed.

This decision was subsequently affirmed in

42 N. Y., 160.

In *Perkins* vs. *Spaulding*, Ky. (3 T. B. Mon. 12),

it was held that where an appeal was taken and a stay bond given conditioned that the appellant would prosecute such appeal with good effect and pay all costs and damages awarded against him, in

case the judgment aforesaid should be affirmed, and on a hearing of the appeal, a judgment was rendered by the Appellate Court by consent ofa ll parties, but no judgment was entered *affirming* the judgment of the lower Court, the condition of the bond was not broken, and the sureties were not liable.

In the case of

Kibble vs. *Butler,* 28 Miss., 587,

a stay bond was given on appeal to the Supreme Court, in a suit in equity. On the hearing of the appeal the Appellate Court reversed the judgment, but proceeded to render another judgment, which should have been rendered by the Court below, and which was in another form, *in effect, the same judgment as the one reversed.* Held on appeal that the sureties on the bond were not liable.

As we have already suggested, if the original decree provided, as the Circuit Court of Appeals determined that it should have provided, and as the Circuit Court understood the decision of the Court of Appeals when it entered its final and modifying decree, from which no appeal was ever taken, that in view of the circumstances as disclosed by the record in that case, it was equitable and just that the interest of the defendant in error, Dr. C. F. Buckley, should not be foreclosed and terminated by January 1, 1899, nor before the 1st day of November, 1899,

then it would have been unnecessary for him to have given any supersedeas bond on his subsequent appeal therefrom, and he would have been entitled to remain in possession of the land, until it was finally tendered by him to Crane. The sureties upon the bond, being interested only in the reversal or modification of that part of the decree, and the Court of Appeals having modified the decree to such an extent that it amounted to a reversal thereof, so far as the right to such possession was concerned, it necessarily follows that the appeal prosecuted by the defendant in error, Buckley, from the original decree, so far as it affected his right to remain in possession of the premises involved in that controversy, was prescuted to effect, and no breach of the supersedeas bond has occurred.

It follows, therefore, that the Judgment of the Circuit Court of Appeals was correct, and should be affirmed.

Respectfully submitted,

D. M. DELMAS,
Attorney for Defendants in Error.

Dated, Oct. 15, 1906.

Service of the written Brief
admitted this 18th day of Oct. 1906

William Grant and
Charles S. Cushing
Attorneys for Plaintiff
in Error.

Supreme Court of the United States.

No. 58.—October Term, 1906.

Henry A. Crane, Plaintiff in Error,
vs.
Cornelius F. Buckley, Rudolph Spreckles and Timothy Hopkins, Defendants in Error.

In error to the United States Circuit Court of Appeals for the Ninth Circuit

[December 3, 1906.]

Mr. Justice Day delivered the opinion of the Court.

This was an action upon a supersedeas bond, brought by the plaintiff in error, Henry A. Crane, against defendants in error, Cornelius F. Buckley as principal, and Rudolph Spreckles and Timothy Hopkins as sureties.

The bond was given in an action brought by Crane against Buckley in the Superior Court of Tulare County, California, removed to the United States Circuit Court of the Southern District of California.

Crane brought suit to foreclose a contract for the sale of certain lands to Buckley and for the recovery of possession thereof. Upon answer and cross bill Buckley made the defense that the sale was procured by false and fraudulent statements and misrepresentations. The court found for complainant Crane; that the charges of fraud were not sustained; that the rights, interests and claims of Buckley in and to the property should be foreclosed, subject to the equitable privilege that if Buckley should pay to Crane prior to January 1, 1899, the unpaid portion of the purchase price and the interest thereon, with taxes and costs, Crane should convey to Buckley all the said real estate pursuant to the agreement of purchase, and it was provided in said decree:

"And unless said respondent shall place on file herein some sufficient and satisfactory evidence that he has paid, or has tendered, and is able, ready and willing to pay, to said complainant, Henry A. Crane, the amounts of money hereinbefore provided to be paid for the purchase of said property, on or before the first day of January, A. D. 1899, it is ordered, adjudged and decreed that the clerk of this court do, on request of said complainant, Henry A. Crane, or of his counsel, issue a suitable and sufficient order or writ to the marshal of this court, and under the seal thereof to remove said respondent, Cornelius F. Buckley, from the possession, use and occupation of said real property, water ditches, water rights and rights of way, and to place complainant, Henry A. Crane, or his legal representatives, in the exclusive possession, use and occupation thereof."

This decree was entered on November 16, 1898; on December 16, 1898, Buckley appealed from the decree to the Circuit Court of Appeals, and a supersedeas bond in the sum of $8,000, being the one in suit, was given. This bond is as follows:

"Whereas, the said respondent and cross complainant is desirous of staying the execution of the said judgment so appealed from in so far as it relates to the possession of the land and premises involved therein, and is desirous of staying the execution of said judgment or decree, so appealed from, in so far as it relates to the costs awarded to complainant therein:

"Now, the condition of the above obligation is such that if the said C. F. Buckley shall prosecute his appeal to effect, and shall answer all damages and costs that have been and shall be awarded against him, if he fails to make his appeal good, and if he shall answer all damages that shall accrue to the said respondent by reason of the value of the use and occupation of the land and premises from the time of said appeal until the delivery of possession thereof to said Henry A. Crane, and for all waste committed thereon, then the above obligation to be void, else to remain in full force and effect."

October 2, 1899, the Circuit Court of Appeals affirmed the decree. On October 19, 1899, Buckley having filed a petition for rehearing as to a part of the judgment given October 2, 1899, or for such modification thereof as would allow him until November 1, 1899, within which to make the payments required, the Circuit Court of Appeals found:

"The record does show that the appellant made large payments under the contract, and that he has made other large expenditures in the improvements of the property, which was the subject of the contract. It is also true that the sums remaining due from the appellant under the contract were large. These payments, the decree of the court below, which was entered on the 16th day of November, 1898, required to be made prior to January 1, 1899, in order that the rights and interests of the appellant in the property be saved, which were by the decrees otherwise forever foreclosed and ended. Under the circumstances appearing in the record this court is of the opinion that it is equitable and just to allow the appellant until the 1st day of November, 1899, within which to make the payments required by the decree from which the appeal is taken, and, accordingly, it is ordered that the judgment of this court on the 2d day of October, 1899, be, and hereby is, so modified as to read: 'Cause remanded to the court below, with directions to substitute for the first day of January, 1899, the first day of November, 1899, within which the payments therein provided for are permitted to be made, and, as so modified, the decree is affirmed.'" (97 Fed. Rep. 980.)

Upon mandate from the Circuit Court of Appeals, this modification was entered in the Circuit Court.

Possession of the property was not in fact delivered till November 4, 1899. After the proceedings above recited action was commenced on the bond to recover $8,000, the penalty thereof, for the alleged value of the use and

occupation of the premises by Buckley, between January 1 and November 1, 1899, and waste.

On the first trial of the case in the Circuit Court a verdict of $5,000 was rendered against the present defendant in error, afterwards reduced to $3,000.

This judgment was reversed upon writ of error to the Circuit Court of Appeals. (123 Fed. Rep. 29.)

Upon a subsequent trial of the case, upon instructions following the ruling of the Circuit Court of Appeals, a verdict and judgment were rendered in favor of the defendant in error. Another writ of error being taken to the Circuit Court of Appeals, this judgment was affirmed, and the plaintiff in error brought the case here.

The question in this case as presented here is briefly this: Can the plaintiff in error recover upon the supersedeas bond for the value of the use and occupation of the premises in question from January 1, 1899, to November 1, 1899? This was the period for which the Circuit Court of Appeals, upon the application for rehearing, modified the decree so far as to extend the right of Buckley, one of the defendants in error, and the principal in the bond, to remain in possession of the premises, postponing the foreclosure of his rights therein until the end of the period named in the extension. The bond was given under cover of section 1000 of the Revised Statutes of the United States, which provides:

"Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer by damages and costs where the writ is a supersedeas and stays execution, or the costs only where it is not a supersedeas as aforesaid."

The object and purpose of this section and the bond given in pursuance thereof is to indemify the party prevailing in the original suit against loss in the respects stated in the bond, by reason of an ineffectual attempt to reverse the holding of the trial court. The successful party in this case, the plaintiff, could not have the decree executed, so far as the possession of the property was concerned, after the supersedeas bond was given, and the purpose of that instrument was to secure him from loss during the time and to the extent that his hand was stayed from action. In order to keep the obligation of the bond it was necessary that the plaintiff in error should substantially reverse the judgment or decree in the respects in which the bond was indemnity. As was said by Mr. Chief Justice Waite, in *Gay* v. *Parpart*, (101 U. S. 391–392):

"If, on final disposition of a writ of error or appeal, the judgment or decree brought under review is not substantially reversed, it is affirmed and the writ of error or appeal has not been prosecuted with effect."

It is elementary that the obligation of sureties upon bonds is *strictissimi juris*, and not to be extended by implication or enlarged construction of the terms of the contract entered into. What then was the attitude of the case when this appeal bond was given? The action had been brought to foreclose a contract of purchase. The defense had proved unavailing. The decree had provided that unless Buckley made the payments required by January 1, 1899, his right and interest in the property should be forever foreclosed, and a writ should issue to put the plaintiff in possession of the property.

From this decree Buckley appealed, and in order to prevent its execution gave the bond in suit, which recites that he is desirous of staying the execution of the judgment appealed from in so far as it relates to the possession of the lands and premises involved, and as to costs, which are not now in controversy. Then comes the condition of the obligation, that the appellant shall prosecute his appeal to effect, and the undertaking that if he fails to make his appeal good he shall answer in damages which shall accrue by reason of the value of the use and occupation of the premises until the delivery of the possession thereof, and for waste committed thereon. The effect of this bond was to permit Buckley to remain in possession and to require him to prosecute his appeal to effect; in default of which he and his sureties may be subjected to liability upon the bond.

What is meant by prosecuting his appeal to effect? It is an expression substantially equivalent to prosecuting his appeal with success; to make substantial and prevailing his attempt to reverse the decree or judgment awarded against him.

It is to be remembered that there is not involved in this suit any right to recover for use and occupation other than that between the dates of January 1, 1899, and November 1, 1899. This is the very time during which, by the modified decree entered by virtue of the order of the Circuit Court of Appeals, the foreclosure of the contract was postponed and the defendant in error, Buckley, permitted to remain in possession of the premises.

As we have said, the appeal bond was to secure the plaintiff from loss in the use and possession of the premises, unless Buckley prosecuted his appeal to effect. It is manifest that the effect of the decree in the Circuit Court of Appeals was to extend the time of rightful possession for the period covered in this suit. This right of possession, withheld from the plaintiff in error by the extension awarded in the Court of Appeals, was the essence of the thing for which the plaintiff in error was indemnified by the terms of the obligation. We cannot think it makes any legal difference in the liability of the sureties upon the bond that Buckley did not pay the balance of the purchase money within the time of the extension. The effect of the

decree was to extend the right of possession and to prevent a foreclosure of his rights after January 1, 1899, until the date named, November 1, 1899.

This extended right of possession and postponement of foreclosure to November 1, 1899, Buckley gained by the appeal, which, in our view, he thus prosecuted to effect, or what, is another way of saying the same thing, to a successful issue upon the very thing—the wrongful possession of the property—against which the plaintiff in error was indemnified by the terms of the obligation sued upon. In this view of the case the judgment of the Circuit Court of Appeals is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.